Robert Fisher QC

INTERIM REPORT FOR MINISTER OF JUSTICE

ON COMPENSATION CLAIM BY DAVID BAIN

13 December 2012

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EXECUTIVE SUMMARY*

Origins of this report

1. In 2011 the Hon Simon Power, the then Minister of Justice, asked the Hon Justice Ian Binnie QC, a retired judge of the Supreme Court of Canada (**Binnie J**), to provide advice on an application by David Bain for compensation for wrongful imprisonment.

2. In his report of 30 August 2012, supplemented on 25 September 2012, (**the Binnie Report**) Binnie J concluded that David Bain was innocent on the balance of probabilities; concluded that wrongful conduct by authorities qualified as the necessary extraordinary circumstances; and recommended that compensation be paid.

3. By letter of 26 September 2012 you asked me to conduct a peer review of Binnie J's report in the following terms:

> a. Review Justice Ian Binnie's report and such additional relevant information as you consider necessary and provide advice to me on whether or not you agree with his conclusion that David Bain has established his innocence on the balance of probabilities, but not beyond reasonable doubt, stating your reasons in full;
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> b. If you agree with Justice Binnie's conclusion, provide me with your advice on any factors particular to Mr Bain's case that you consider are relevant to the Executive's assessment of whether there are extraordinary circumstances such that it is in the interests of justice that the claim be considered.
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> c. You [are] not asked to provide an opinion on whether the "extraordinary circumstances" test is met nor whether compensation should be paid as these assessments are reserved for the judgement of the Executive.

4. At our meeting on 26 September 2012 we agreed that the task should be approached in two stages.

5. The first stage is addressed in the interim report that follows. In finalising this report I have had the benefit of a response to a draft of my report in Binnie J's four-page email of today's date and made modifications in consequence.

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* I am grateful to Rebecca Edwards BA, LLB (Hons) (Auckland), LLM (Virginia), Barrister, and Kate Tolmie Bowden BCom (Auckland), Law Clerk, for their assistance in preparing this report.
NOTE: THERE IS A MALFUNCTION IN THE FOOTNOTE CROSS-REFERENCING IN THIS DOCUMENT. A CORRECTED DOCUMENT WILL BE PROVIDED AS SOON AS POSSIBILE.

6. In this report I have expressed final conclusions on the principles to be applied to an inquiry of this kind; found that those principles have been misunderstood in the Binnie Report; and concluded that in consequence it would be unsafe to act upon the Binnie Report.

7. This interim report does not purport to apply the appropriate tests to the actual evidence. As we discussed, a second and final report will be required for the purpose of reviewing the evidence afresh and arriving at conclusions on the merits. An outline of the suggested steps involved in preparing such a report is included at the end of this report.[1]

8. A full copy of your letter of 26 September 2012 and annexures is annexed to this interim report. This interim report is confined to an analysis of the reasoning revealed in the Binnie Report itself. It is based solely on views I have formed in reading that report together with legal and research materials not specific to the Bain case. I have not derived assistance from the wider materials listed in your letter so far, although much of that material would doubtless be relevant to a second report on the merits.

Summary of conclusions in relation to the Binnie Report

9. My conclusions in relation to the Binnie Report are as follows:

(a) The report is well organised, comprehensive and thorough. It is a valuable collation of the evidence currently available in relation to this claim.

(b) Binnie J went beyond his mandate. He did not have authority to express any conclusion on the question whether there were extraordinary circumstances such that compensation would be in the interests of justice. Nor was he invited to make any recommendation as to whether compensation should be paid. Those errors have been compounded by the publicity given to conclusions on matters which ought to have been for Cabinet alone to decide.[2]

(c) In assessing innocence Binnie J made fundamental errors of principle. I will return to these in a moment.[3]

[1] See below at [24950].
[2] See below at [26].
[3] See below at [11].

(d) In assessing misconduct by authorities Binnie J has also made fundamental errors of principle to which I will shortly return.[4]

(e) The correct principles should now be applied to the evidence afresh. That is far from saying that a fresh assessment would produce any different outcome. It is perfectly possible that it would vindicate Binnie J's conclusions.

(f) Binnie J criticised named individuals without giving them adequate opportunity to respond. As it presently stands, the Binnie Report is vulnerable to judicial review by the named individuals. Steps should be taken to remedy that situation.[5]

10. The errors of principle referred to now follow.

Justice Binnie's finding that David Bain was innocent

11. In my opinion the following were errors of principle:

(a) Instead of assessing each relevant item of evidence to see whether it increased or reduced the likelihood of innocence, and if so by how much, Binnie J discarded any item that was not individually proved on the balance of probabilities.[6]

(b) Instead of considering the cumulative effect of all relevant items of evidence, he arrived at a provisional conclusion of innocence based on one item (luminol footprints) followed by a serial testing of that conclusion against others in turn.[7]

(c) Instead of requiring David Bain to satisfy him on the balance of probabilities throughout the inquiry, he imposed an onus on the Crown wherever the Crown suggested a factual possibility inconsistent with innocence.[8]

(d) Instead of founding his conclusions exclusively upon the evidence available to him, he drew an inference adverse to the Crown in cases

[4] See below at [20].
[5] See below at [224].
[6] See below at [76]–[86].
[7] See below at [87]–[98].
[8] See below at [99]–[104].

where, in his view, the Police ought to have gone further in its investigations.[9]

12. These principles apply to all situations in which a factual conclusion is required drawn from a multiplicity of evidentiary sources. They are not confined to criminal cases. Since they are ultimately based on logic, they necessarily apply with equal force to a compensation inquiry of this kind.

13. Binnie J's approach to the evidence also included the following features:

(a) He appeared to regard the jury acquittal as something that was relevant to the question whether David Bain had proved his innocence.[10]

(b) He appeared to accept David's version of events without question except where it directly conflicted with other witnesses.[11]

(c) He relied on "innocent openness" defences[12] to turn seemingly incriminating admissions or clues into points thought to support David's genuineness and credibility.[13]

14. Of the above aspects of Binnie J's approach, some may have played little part in his conclusion that David Bain was innocent. In that category may well be the occasions on which he imposed an onus of proof on the Crown, drew an inference adverse to the Crown from gaps in the evidence, drew attention to the jury acquittal, or relied on "innocent openness" defences.

15. More serious, however, was his decision to disregard any item of evidence that did not prove a subsidiary fact on the balance of probabilities. His approach was contrary to the law of New Zealand and to a proper understanding of probability theory. In a circumstantial evidence case, an item of evidence is relevant if it increases or reduces the likelihood of guilt (or in this case innocence). The onus and standard of proof arise only when deciding whether all of the evidence in its totality satisfies the relevant standard of proof.[14]

16. The result of that misunderstanding was to exclude from further consideration a great deal of evidence that most people would have regarded as significant.

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[9] See below at [105]–[107].
[10] See below at [130]–[133].
[11] See below at [113]–[121].
[12] "Innocent openness" defence is used here to refer to an argument frequently advanced by defence counsel to explain away seemingly incriminating admissions or clues left by a suspect. The argument is that the admissions or clues are actually a sign of innocence because a guilty person would not have been so open and ingenuous.
[13] See below at [122]–[129].
[14] See below at [56].

Discarded in that way were the blood stains on David's clothing, the broken glasses, David's fingerprints on the rifle, arguable shielding of part of the rifle, Robin's motive, Robin's mental stability, David's post-event admissions, factors consistent with suicide, David's admission that he heard Laniet gurgling, David's gloves, and knowledge of the whereabouts of the trigger key. The point is not that any of these items would have been convincing on its own. It is that if they increased or reduced the likelihood of innocence at all, then in combination with others they might have made all the difference.

17. In addition to that problem, the way in which Binnie J approached the cumulative significance of the evidence in its totality seriously skewed the exercise towards an innocence outcome. That followed from an approach which began with a provisional conclusion of innocence based on a single item of evidence followed by serial comparison of that item with each of the others. This too is contrary to the way in which circumstantial evidence cases are assessed in this country and elsewhere. The process adopted had much in common with the selection of a champion gladiator against whom all others are tested singly and in turn. The problem with that approach is that one never finds out what would have happened if the battle had been waged between the full armies for each side.

18. Finally, Binnie J's approach to the facts was markedly generous to David Bain in its reliance on background facts sourced from David. Western courts and scientists have increasingly recognized that, contrary to their own expectations, judges and juries are not capable of reliably determining credibility based on their assessment of a speaker's demeanour. None of us has the ability to decide whether or not a witness is to be believed based on watching and listening to that witness in person.[15]

19. I regret that in my view those difficulties cannot be dismissed as technicalities. They undermine the confidence one might otherwise have had in Binnie J's conclusion that David Bain was innocent.

Justice Binnie's finding that there was serious wrongdoing by authorities

20. I also find myself having to differ from Binnie J over the principles to be applied in deciding whether there has been serious misconduct by authorities for the purpose of a compensation claim.

21. At least in theory, there were two ways in which authority misconduct might have qualified as a relevant extraordinary circumstance in this case. One was to bring the case within the wording of the misconduct illustration which the Minister

[15] See below at [119]–[121].

provided to Binnie J. The other was to qualify under an overriding discretion to admit cases outside that illustration in special circumstances.

22. Binnie J thought that the Bain case came within the first of those two possibilities, the Ministerial illustration of authority misconduct. In my view in doing so he made the following errors of principle:

(a) He paid no regard to the need for an official admission or judicial finding of serious misconduct.[16]

(b) He was prepared to treat conduct as "serious misconduct" even where it was neither deliberate nor done in bad faith.[17]

(c) He did not see the need for any plausible connection, however indirect and remote, between the misconduct, on the one hand, and the existence or duration of the imprisonment in respect of which compensation was claimed, on the other.[18]

23. It remains the case that Cabinet's discretion to make an ex gratia payment is open-ended. In that sense it may not seem to matter whether a Referee has gone beyond the particular extraordinary circumstances examples provided in his or her instructions.

24. However in my view Binnie J's approach cannot be justified as the exercise of a broader discretion to go beyond the requirements of the misconduct illustration provided by the Minister. My reasons are these:

(a) Binnie J did not purport to rely upon any overriding discretion to depart from the wording of the example provided by the Minister. He went to considerable lengths to analyse what he understood was required by the Minister's specific description of authority misconduct[19] before going on to apply those requirements, as he saw them, to the facts. If he had correctly understood those requirements his conclusion might have been very different.

(b) The historical purpose of the ex gratia compensation discretion was to compensate the innocent, not to root out official misconduct.[20] To the extent that condemning official misconduct has been engrafted onto that process, it should be reserved for those cases which are so egregious that

[16] See below at [159]–[165] and at [200].
[17] See below at [166]–[176] and at [201]–[208].
[18] See below at [183]–[187] and at [210]–[212].
[19] Binnie Report at [480] to [492].
[20] See below at [146].

they threaten the integrity of the judicial system. Planting false evidence is a classic example. Overlooking a possible line of investigation is not.

(c) There is a risk that inquiries into official misconduct that are not tethered to clearly-defined terms of reference, such as the illustration provided by the Minister, will spiral out of control, extend into fields already well catered for by other agencies, and be procedurally unfair to the officials involved.

(d) Flexibility scarcely matters if a Referee is merely advancing factors thought to be relevant to the exercise of a discretion that is left entirely to Cabinet. In those circumstances Cabinet can pick and choose which factors it regards as relevant. But where, as here, the Referee has gone on to make a recommendation that compensation be paid, he has already purported to decide what is relevant and what is not. That makes it particularly unfortunate if he has gone beyond the illustration of authority misconduct provided to him.

25. These views are now explained in more detail in the report that follows.

CHAPTER 1: SCOPE OF JUSTICE BINNIE'S MANDATE

The terms of reference

26. The terms of reference for Binnie J were defined in the Minister's letter to him of 10 November 2011. In the Minister's outline of the Cabinet's approach to these matters the Minister stated:[21]

> Ultimately, the question of whether an application qualifies for the exercise of the residual discretion reserved by Cabinet is a judgement for the Executive branch of government to make.

27. As to specific instructions the Minister stated:[22]

> Accordingly, at this time I seek your advice on:
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> - whether you are satisfied that Mr Bain is innocent on the balance of probabilities and, if so, whether he is also innocent beyond reasonable doubt; and
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> - any factors particular to Mr Bain's case (apart from your assessment of innocence beyond reasonable doubt) that you consider are relevant to the Executive's assessment of whether there are extraordinary circumstances such that it is in the interests of justice to consider his claim.
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> Because the question of whether 'extraordinary circumstances' apply in a particular case is ultimately a judgment for the Executive to make I am seeking advice on factors you consider relevant to the assessment rather than an opinion on whether Mr Bain's application qualifies for the exercise of the residual discretion reserved by Cabinet.

Scope of Justice Binnie's conclusions

28. Binnie J overlooked those instructions. In contrast to the Minister's words, Binnie J defined his mandate as follows:[23]

> In short, my mandate is to express an opinion about whether or not:
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> (i) David Bain is factually innocent of the five killings and, if so,

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[21] Letter from Simon Power to Binnie J instructing on the claim for compensation by David Bain (10 November 2011) at [42].
[22] Ibid at [45]–[46].
[23] Ibid at [9]–[10].

> (ii) Whether the circumstances of his conviction were so extraordinary as to warrant an ex gratia payment of compensation by the New Zealand government.
>
> It is important to emphasize, as the Minister's letter makes clear, that my role is to provide a recommendation not a decision. The question of David Bain's compensation rests firmly in the hands of the Cabinet.

29. Binnie J was not asked to make a recommendation. He was asked to advise whether he was satisfied David Bain was innocent, on either the balance of probabilities or beyond reasonable doubt. He was further asked to identify any factors particular to David Bain's case that he considered relevant to the Executive's extraordinary circumstances discretion. He was effectively told that his opinion was not sought on the way in which that discretion should be exercised. He was told that it was for Cabinet alone to decide whether there were extraordinary circumstances such that it was in the interests of justice to consider the claim.

30. As foreshadowed in the introduction to his report, Binnie J went on to both express his own conclusions as to the way in which the extraordinary circumstances discretion ought to be exercised and to express his view on whether compensation should be granted.[24] It was beyond the scope of his mandate to express conclusions on either of those matters.

31. By giving those unsolicited conclusions, Binnie J encroached on matters which ought to have been left for Cabinet alone. It must immediately be said that Binnie J would not have been responsible for the publicity that followed. However the problem of going beyond his mandate has been compounded by the publicity given to opinions which were intended to remain confidential unless and until Cabinet elected to release them.

Consequence of going beyond the mandate

32. In legal terms Binnie J exceeded his jurisdiction. In other circumstances that might have rendered his report vulnerable to judicial review.

33. Judicial review will be discussed later in this report in the context of personal criticisms without adequate opportunity for response. For present purposes it is sufficient to say that the possibility of review for excess of jurisdiction is no more than theoretical. In practice the only potential plaintiff seems to be the Crown as the legal embodiment of the Executive. There would be little point in having the Executive seek a declaration from the Courts that Binnie J exceeded his mandate

[24] Binnie Report at [27].

when it could achieve the same result by simply ignoring that part of his report which it did not seek.

34. It is ultimately for Cabinet to decide whether it pays any regard to unsought opinions on matters which are exclusively its preserve.

CHAPTER 2: THE REQUIRED APPROACH TO PROBABILITIES

The role of probabilities

35. Factual conclusions are drawn from relevant evidence. Evidence is relevant if it makes a fact in issue more probable or less probable. The principles used for assessing probability are normally applied intuitively. There is no legal or logical requirement that they be expressly stated. But if there is reason to think that the wrong principles were applied, it will undermine confidence in the conclusions that follow.[25]

36. In the present case everyone is agreed that the murders must have been committed by either Robin or David Bain. In deciding which of the two, one must bear in mind that David is not an impartial source of evidence and that the victims are no longer here to speak for themselves. Nor is there any living eye witness.

37. It follows that conclusions as to what happened must be based upon an analysis of the probabilities stemming from the surrounding circumstances. In short it is a circumstantial evidence case. The way in which probabilities are assessed in circumstantial evidence cases is critical to David Bain's application for compensation.

38. Some probability requirements come from well-recognised legal principles. For example legal principles govern the onus and standard of proof. They also govern the way in which the onus and standard of proof are applied to circumstantial evidence cases. Those principles will be explained in this chapter.

39. Other probability considerations are techniques derived from logic and experience. An example is the role of a suspect's own evidence. Logic and experience suggest that if a suspect has lied in denying his responsibility for the crime itself, he will scarcely shrink from lying about the details. So for the purpose of drawing inferences from the surrounding facts, most decision-makers will prefer sources other than the suspect. Techniques of that kind will be dealt with in a later chapter.

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[25] See further Robert Fisher "Probability and Evidence" (paper presented to LexisNexis Criminal Law Conference, Auckland, 2003); Robert Fisher and John Wild "Evidence – How It Works" (paper presented to New Zealand Law Society Seminar, 2004) at 5–10.

Onus and standard of proof

40. The onus of proof (sometimes referred to as the "burden of proof") is the obligation to positively persuade the decision-maker. The standard of proof is the level of certainty to which the decision-maker must be persuaded. In a typical dispute, the party with the onus of proof will fail if he or she is unable to persuade the decision-maker to the required level of certainty.

41. In the Bain case four different combinations of onus and standard have arisen:

(a) *Proof of guilt beyond reasonable doubt*. Proving guilt was the task faced by the Crown in each of the two Bain trials in the High Court. It was not the responsibility of David Bain to prove his innocence. The standard of proof required of the Crown was proof beyond reasonable doubt. In the first trial the jury was convinced beyond reasonable doubt. In the second it was not. The verdict in the second trial remains consistent with the possibilities that the jury was convinced of his innocence, was left feeling unsure about it, or thought that he was probably guilty.

(b) *Proof of guilt on the balance of probabilities*. In a civil case the onus is still on the plaintiff but the standard of proof is merely to show that the plaintiff's version is more probable than not. This is much easier to satisfy than proof beyond reasonable doubt. That explains why, for example, an accused such as O J Simpson might be acquitted in a criminal trial and yet found to have committed the act in question when later sued for damages.

(c) *Proof of innocence on the balance of probabilities*. Where a person sets out to show that he or she is innocent on the balance of probabilities there is a different situation again. Here, the onus of proof has moved from the accuser (that is, the Crown or plaintiff) to the person accused (in this case David Bain). However the standard of proof demanded of David at this level is to show innocence only on the balance of probabilities. He need merely persuade the Referee that it is more likely than not that he is innocent.[26] This is the requirement normally made of an applicant seeking compensation under the Cabinet Criteria.

(d) *Proof of innocence beyond reasonable doubt*. It is difficult for a person to show that he/she is innocent beyond reasonable doubt. The applicant must not only prove a negative but prove it to a very high standard. If the

[26] The Referee being the Queen's Counsel or other person to whom the Minister of Justice has referred the inquiry under the Cabinet Guidelines.

> Referee is left with a reasonable doubt, that is to say one which leaves the Referee feeling unsure whether or not the applicant might have committed the crime, the application fails to meet this test. On the other hand, this high standard can be attained by unequivocal evidence. Such evidence might be, for example, DNA findings demonstrating that the crime in question could only have been committed by some other person, or evidence showing that the applicant had a cast iron alibi at the time the crime was committed.

42. Of those four combinations, it is only the last two that continue to be relevant to David Bain's application for compensation.

43. The terms of reference placed the onus of proof on Daivd Bain. That was spelled out expressly in relation to innocence.[27] It was also implicit in the reference to factors relevant to extraordinary circumstances. That follows from the fact that David was applying for compensation which would be granted only if he showed the necessary grounds for it. If David failed to persuade Binnie J that there were positive factors relevant to the assessment of extraordinary circumstances, that part of the application for compensation necessarily failed.

44. There is no difficulty over the relevant standards of proof. In relation to innocence the standards are expressly spelled out ("innocent on the balance of probabilities" and "innocent beyond reasonable doubt"). In relation to extraordinary circumstances it is implicit that the lower standard would suffice.

The treatment of circumstantial evidence

45. This case is typical of circumstantial evidence cases. In such cases overall probabilities are derived from the combined effect of a number of independent items of evidence. Typical items in the present case were the luminol footprints, the broken glasses and the fingerprints on the rifle.

46. While an independent assessment of each item of evidence is part of the inquiry, the ultimate determination of guilt or innocence turns on an assessment of all of those items viewed in combination. The fundamental principle is that the probative value of multiple items of evidence supporting the same factual allegation is greater in combination than the sum of the parts. As each item of evidence implicating the accused is aggregated, the probability of guilt increases

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[27] Letter from Simon Power to Binnie J instructing on the claim for compensation by David Bain (10 November 2011) at [41] and [45].

exponentially.[28] When a burglary occurs we are ready to accept as pure coincidence that the accused was seen walking away from the burgled address; less ready to accept as a series of coincidences the facts that he was also running, was carrying burglary tools, was wearing a mask, and later sold items resembling those that had been stolen.

47. The usual analogy is the strands in the rope explanation: each strand of evidence gains strength from the other, so that whilst an individual strand may be insufficient to support the load (in this case proof of innocence) the combination of them may be enough.[29]

48. In assessing a circumstantial evidence case it is not enough to evaluate each item in isolation and then stop; it is necessary to go on to consider the effect of all relevant items in combination. Strictly speaking the rope analogy underrates the importance of combining the different items of evidence. The effect of combining them is not so much a matter of adding the various strands in the rope as multiplying them; the whole is greater than the sum of its parts.[30]

49. It follows that in circumstantial evidence cases there are two distinct steps in the deductive process: (i) assessing the probative force of each item of evidence considered individually and (ii) assessing the cumulative effect of combining the probative force of all the items. These principles apply to all situations in which a factual conclusion is required drawn from a multiplicity of evidentiary sources. They are not confined to criminal cases. They apply with equal force to a compensation inquiry of this kind.

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[28] *R v Guo* [2009] NZCA at 612 [49] - [52]; *R v Hoto* (1991) 8 CRNZ 17 at 21; and for the same principle used in multiple rape cases see *R v Z* [2000] 2 AC 483 at 508; [2000] 3 WLR 177; [2000] 3 ALL ER 385 at 406.

[29] The analogy used by Panckhurst J in his summing up to the Bain jury in the 2009 re-trial accepted by Binnie J at [181] of his report.

[30] The mathematical underpinning for the assessment of multiple items of evidence is known as Bayes' theorem. The theorem is that the posterior odds (ie the odds in favour of a proposition after a particular item of evidence has been received) are equal to the prior odds (ie the odds in favour before that item of evidence was received) multiplied by the likelihood ratio of that item of evidence. The likelihood ratio is the measure of probability indicated by that item of evidence given that each of the competing hypotheses is true. Although rarely articulated as such, Bayes' theorem underlies the way in which probabilities are assessed in legal cases. See for example *R v Guo,* above, n 28; *R v Hoto*, above n 28; *Cross on Evidence (NZ)* (online looseleaf ed, LexisNexis NZ Ltd) at [3.13]. See also Bernard Robertson "Expert Evidence in Child Sex Abuse Cases: A Comment" [1989] NZLJ 163; Bernard Robertson "Fingerprints, Relevance and Admissibility" [1990] NZ Recent Law Review 252; Robertson and Vignaux "Probability and the Logic of the Law" (1993) 13 Oxford Journal of Legal Studies 457 at 459; Fisher, "Probability and Evidence", above n 25; Fisher and Wild, "Evidence – How It Works" above n 25.

(i) Probative force of each item considered individually

50. The first question in the deductive process is simply whether the item in question makes guilt more likely or less likely, and if so by how much. This may be likened to deciding whether an item of evidence serves as a strand in the rope and, if so, how thick the strand is. In mathematical terms, it is the process of assigning a likelihood ratio to an individual item of evidence.[31]

51. If an item of evidence has no logical bearing upon the likelihood of innocence it is discarded. But if it does have a logical bearing upon the likelihood of innocence, the probative value of that item must be assessed. Some items of evidence (such as the timing of David's return in relation to the turning on of the computer) may have a strong impact upon the overall probabilities. Others (such as David's ownership of the rifle) may have very little.

52. Each probability factor may have a positive or negative effect on innocence. In a case like this, probabilities can most usefully be expressed as the degree to which a given item of evidence increases the probability that Robin was the culprit (and hence that David was innocent) or that David was the culprit (and hence that David was guilty).

53. The onus and standard of proof play no part at this step in the deductive process. They do not come into play until the next step.

(ii) Cumulative effect of combining the individual probability assessments

54. The second step in the deductive process is to consider the cumulative effect of combining the probabilities stemming from each item of evidence. This may be likened to assessing the strength of the rope as a whole once all its strands are combined.[32]

55. The critical point is that consideration of the onus and standard of proof occurs only at the second stage of the process. The onus and standard have no role to play until the various items of evidence are combined.

56. That is a matter of law as well as probability theory. In circumstantial evidence cases New Zealand law does not require that the individual components of evidence be proved to any particular standard. The onus and standard of proof is invoked only

[31] See Bayes theorem, above n 29.
[32] Mathematically, it is the process of repeatedly applying Bayes' theorem as the likelihood ratio of each item is progressively combined with the others.

when the components are combined.[33] The same approach is taken in England,[34] Canada [35] and the United States.[36] In Australia there are complications that could have no application to the current inquiry.[37]

Assertions of fact by the Crown

57. A factual inquiry of the present kind is not complicated by the possibility of multiple onuses. As this too has caused some difficulty in the present case, it is necessary to say a little about the principles involved.

58. In some legal disputes one party may have the onus of proving certain propositions while the other has the onus of proving others. The incidence of the onus is ultimately a matter of substantive law. In a civil case the allocation of the onus is normally ascertainable from the pleadings. The pleadings will normally show that it is the plaintiff who alleges, and thus must prove, the essential elements of the cause of action. Frequently the defendant alleges, and thus must prove, affirmative defences such as lapse of time under the Limitation Act.[38]

59. No complication of that kind could arise here. When an applicant asks the Government to exercise its discretion to grant ex gratia compensation, the Minister asks a Referee to decide whether the applicant has established certain facts. That position does not change if some other factual hypothesis is raised by the Crown in the course of its submissions to the Referee. The question continues to be simply

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[33] *R v Puttick* (1985) 1 CRNZ 644 at 647, applied in *Ngarino v R* [2011] NZCA 236 at [26] where the Court said "A circumstantial case is, by its nature, made up of strands of evidence from which the Crown invites particular inferences to be drawn. The jury may consider that some strands carry little weight, others more. It is their cumulative weight which is important."

[34] *Hodge's Case* (1838) 2 Lewin 227 [168 ER 1136] per Alderson B; *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276, [1973] 1 All ER 503; Samuels "Circumstantial Evidence" (1986) 150 *Justice of the Peace* 89.

[35] *R v Cooper* [1978] 1 SCR 860.

[36] In *Holland v United States* 348 US 121 (1954) at [25] the Court said: "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more."

[37] In Australia, juries are instructed that for the purpose of deciding whether a fact in issue is proved *beyond reasonable doubt* they should require each circumstantial item to be proved *on the balance of probabilities*: *De Gruchy v R* [2002] HCA 33. A possible explanation is that it was thought desirable to build in extra safeguards when dealing with juries. But note that even had the Australian law for juries applied in this case, it would have required no more than proof of each component to a standard lower than the standard required for proof of the ultimate fact in issue. In the Binnie Report, the standard applied to each individual item of evidence (balance of probabilities) was as stringent as the standard Binnie J was requiring for innocence itself (balance of probabilities).

[38] *Humphrey v Fairweather* [1993] 3 NZLR 91 (HC).

whether the applicant has persuaded the Referee that the factual conclusions essential to the success of the application ought to be accepted.

60. When lawyers refer to the "onus of proof", without more, they are referring to the legal onus. The legal onus is not to be confused with two other concepts, (i) the "evidential onus" and (ii) the risk of non-persuasion having regard to the current state of the evidence. I mention this arcane topic only because it is raised in the Binnie Report.[39]

61. As to (i), "evidential onus" (usually referred to as "evidential burden") is used to refer to the obligation to adduce, or point to, sufficient evidence to make an issue a live one in the proceedings.[40] In a criminal case, for example, a Judge will not permit self-defence to be left to the jury as a possible defence unless there is evidence before the Court to make self-defence a realistic possibility. But that has nothing to do with applications for compensation of the present kind.

62. As to (ii), the risk of non-persuasion having regard to the current state of the evidence is not concerned with onuses of proof at all. Once one party can point to a particular conclusion as the most likely inference to be drawn from the evidence as it currently stands, anyone asserting the contrary must provide additional evidence in support of the contrary before it will be adopted. Suppose the only evidence in the case so far is that witness A says that he saw someone other than the applicant commit the crime. In the absence of further evidence, the applicant can expect the Referee to draw an inference in his favour. Unless the Crown produces other witnesses to say they saw the applicant commit the crime, the applicant will almost certainly win. But it is confusing and incorrect to call that an onus or burden of proof.[41] It is simply a rule of logic: evidence that points to a particular outcome will prevail unless further evidence to the contrary is provided.

Gaps in the available information

63. Another issue raised in the present case concerns gaps in the evidence. Judges, juries and other decision-makers never have all the information they would like. That is the point of the onus of proof. They have to decide cases on the evidence they do have, not on the evidence that they would like to have had but in the event do not. If that means that there is insufficient evidence to come to any factual conclusion on a particular point, the party with the onus on that point fails.

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[39] Binnie Report at [218].
[40] For these principles see *Cross on Evidence*, above n 29 at [2.4].
[41] Casey ME *Garrow & Casey's Principles of the Law of Evidence* (8th ed, Butterworths, Wellington, 1996) at [2.3].

64. That principle does not change simply because one side or the other has failed to avail itself of an opportunity to find and adduce more evidence.

65. It is true that in civil litigation there is a special qualification to that approach known as "the adverse inference rule"[42] or "the rule in *Jones v Dunkel*".[43] The rule may be invoked where a party has deliberately destroyed relevant evidence, or unreasonably refused to produce relevant evidence that was in its immediate power or control. Where a party has deliberately destroyed or withheld evidence it can sometimes be reasonable to infer that the evidence in question would have been adverse to the interests of the party responsible for its absence. This is not so much a rule of law as an exercise in factual reasoning: it will often be reasonable to infer that a party would not have deliberately destroyed or withheld evidence unless it had been adverse to that party's interests.

66. The adverse inference rule does not extend beyond deliberate destruction or deliberate refusal to produce evidence already within a party's power or control. It has never been suggested that it could extend to negligent failure to carry out additional investigations. Careless failure to investigate says nothing useful about the motives of the potential investigator. Inadvertence implies a failure to consider the implications, not a motive to conceal.

67. Absent deliberate destruction of evidence, or police refusal to produce evidence already within its power or control, the adverse inference rule could have no application in a claim to compensation. Compensation applications of this kind must be decided on the strength of the evidence the Referee actually has, not on speculation that evidence he does not have might have been adverse to the Crown.

68. A sharp distinction must be drawn between the exercise of deciding whether David Bain was innocent and the exercise of deciding whether the authorities were guilty of misconduct. One is based on an application of probability principles to all the evidence relating to innocence. The other may well include criticism of authorities for the mishandling of exhibits or failure to carry out further inquiries. Mixing the two does not make the task any easier.

Summary of probability principles

69. The probability principles that apply to an application of this kind can be summarised as follows:

(a) The onus of proof lies on the applicant throughout the process.

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[42] *Morris v. Union Pacific R R* 373 F 3d 896 (8th Cir 2004) at 900.
[43] *Jones v Dunkel* [1959] 101 CLR 298.

(b) In a classic circumstantial evidence case such as this one, two steps are required in the deductive process. The first is to assess the probative value of each item of evidence considered individually. The second is to assess the cumulative effect of combining the probative force of all the items.

(c) Consideration of the onus and standard of proof is relevant only at the second stage of that process. The onus and standard are irrelevant when assessing the probative value of each item of evidence.

(d) The onus does not change where the Crown asserts a fact.

(e) Nor does the onus change where there are gaps in the available information that might have been filled had the police conducted more wide-ranging inquiries.

CHAPTER 3: JUSTICE BINNIE'S APPROACH TO PROBABILITIES

Justice Binnie's stated approach

70. Binnie J stated the onus and standard of proof to be as follows: [44]

> The onus is on David Bain to establish his factual innocence as a condition precedent to compensation. If he cannot do so beyond a reasonable doubt he must do so on a balance of probabilities, which simply means that it is more probable than not that he is factually innocent.

71. No objection could sensibly be made to that version of the test. A curiosity is that although the New Zealand test has always been "beyond reasonable doubt" Binnie J consistently refers to it as "beyond *a* reasonable doubt". Concerns have occasionally been expressed that to state the test as beyond "a" reasonable doubt might encourage the decision-maker to seize upon any single source of doubt rather than to view doubt in the context of the case as a whole. The risk seems over-refined and I disregard it.

72. As to circumstantial evidence, Binnie J referred to well-known formulations including the way in which Panckhurst J had summed up to the 2009 jury:[45]

> In the course of his opening remarks to the 2009 jury Mr Justice Panckhurst likened a circumstantial case to a rope made up of many strands. While each strand may not be strong enough to bear the load placed upon it, the strands taken together gather strength from each other. The jury's task was to view as a whole the evidence to determine guilt or innocence.

73. Later in his report Binnie J stated that:[46]

> … the cumulative effect of the items of physical evidence, considered item by item both individually and collectively, and considered in light of my interview with David Bain … persuade me that David Bain is factually innocent …

74. Those formulations are clearly beyond reproach. Unfortunately when it comes to their application to the evidence the report reveals something very different.

Step one: assessing the probability indicated by each item in isolation

75. It will be recalled that when assessing circumstantial evidence two steps in the deductive process were necessary.

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[44] Binnie Report at [7].
[45] Ibid at [182].
[46] Ibid at [476].

76. In the present case the first step was to take each item of evidence, decide whether it had any bearing on the likelihood that either Robin or David was the culprit, and if so, assign to that item its appropriate probative force. Probative force is the extent to which the evidence increases or reduces the likelihood of innocence. One item, for example the timing of David's return in relation to the computer turn on time, might have had strong probative force. Another, for example David's ownership of the rifle, might have had very little. What was needed in relation to each item was therefore a decision as to whether, and by how much, that item increased or reduced the likelihood of innocence. Importantly, the onus and standard of proof had no part to play at that stage of the exercise.

77. Binnie J did not take that approach. His approach was to determine whether each item of evidence in isolation was established on the balance of probabilities. If not, it was discarded from further consideration. In his eyes it came down to a binary choice between the two.

78. In some cases the item of evidence passed Binnie J's balance of probabilities test, for example:

(a) *Computer turn-on time*. As to this item he said "the evidence, such as it is, established on the balance of probabilities a 6.43 am computer turn on time being the number put forward by Mr Cox at the 2009 trial" and he said later "the sequence of the computer turn on time *prior* to David's arrival home is established as more probable than not. On a balance of probabilities, the computer was turned on by Robin".[47]

(b) *Misfed bullet in the lounge*. As to this item he said "On a balance of probabilities I believe this evidence supports the David Bain case."[48]

(c) *Washing machine period*. As to this item he said "the probabilities favour David Bain, in my opinion."[49]

79. In others, Binnie J considered the item of evidence to have failed the balance of probabilities test. In those cases he determined the item of evidence to be unworthy of any further consideration. Examples were:

(a) *David's fingerprints on the rifle*. As to this item he said "On a balance of probabilities I conclude that the prints are not in human blood and that David Bain is entitled to succeed on this issue as well."[50]

[47] Binnie Report at [338] and [348].
[48] Ibid at [454].
[49] Ibid at [356].

(b) *Blood stains on David's clothing*. As to this item he said "the blood stains on the clothing are not explained away beyond any reasonable doubt, but I am satisfied on a balance of probabilities that the innocent explanation is more likely than not to be correct."[51]

(c) *Broken glasses*. As to this item he said the glasses evidence "does not strengthen David Bain's claim to factual innocence, but nor on a balance of probabilities does it weaken it, in my opinion".[52]

80. Nor did this piecemeal approach to the onus always count in David's favour. In some cases evidence that would have been helpful to David's case was excluded, for example:

(a) *Robin's motive*. As to this item Binnie J said "On the issue of Laniet's incest allegation I conclude there is smoke but I cannot find that the record establishes the existence of any fire. The Bain team has not met the standard of proof to establish that a confrontation over incest was 'the trigger.'"[53] On that basis he purported to exclude the evidence despite its obvious relevance. Yet one can detect his reluctance in doing so. He commented: "it is noteworthy that the Police chose to exclude the one suspect (Robin) who was alleged to have a plausible if challenged motive, and pursue for 15 years the other suspect (David) for whom they had found no motive whatsoever."[54]

(b) *Robin's mental instability*. There was extensive evidence on this topic from a number of sources. As to the proposition that Robin would be a likely candidate for "familicide" Binnie J said the "theory may be valid but it falls short of the required standard of proof."[55]

81. At times Binnie J called for a higher threshold of probability before evidence was thought to qualify for further consideration, for example:

(a) *David's post-event admission*. As to this item he said "I do not accept that the attempts of a 22 year old to come to terms with the unthinkable in a rambling conversation with a girlfriend amounts to *compelling evidence* of consciousness of guilt" (emphasis added).[56]

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[50] Binnie Report at [309].
[51] Ibid at [412].
[52] Ibid at [418].
[53] Ibid at [173].
[54] Ibid at [173].
[55] Ibid at [143].
[56] Ibid at [157].

(b) *Robin's suicide evidence excluded if not definitive*. As to this item he said "it is not possible to make definitive findings on every issue surrounding Robin's death. However, once it is conceded that [certain evidence does not exclude] Robin taking his own life, the answer to the question whether he probably did so must necessarily turn on a consideration of the other evidence."[57] In other words the fact that suicide by Robin could not be ruled out as *impossible* was seen as a reason for discarding the evidence on that topic in its entirety. No consideration seems to have been given to the continued importance of the evidence in determining what was *probable*.

82. Binnie J considered that none of the "psychological" evidence passed the stringent screening he had imposed. He felt that such evidence was "fraught with contradiction and difficulty"[58] and that in consequence he should "proceed on the basis that David Bain's assertion of factual innocence ought to be determined on the physical evidence collected at the crime scene."[59]

83. The result was to exclude from further consideration much evidence which most people would have regarded as relevant. Along with all "psychological" evidence, Binnie excluded a number of further items, including:

(a) *Shielding of part of the rifle*. As to this item Binnie J said "I do not believe this evidence contradicts the other evidence relied on by David Bain to establish factual innocence."[60]

(b) *Margaret's glasses, opera gloves and green V-necked jersey*. As to the gloves he said "… there is no evidence linking the gloves to David at any relevant time except through ownership which, as the Crown properly argued in the case of Margaret's spectacles, is irrelevant."[61] He determined that the glasses, opera gloves and green V-necked jersey simply do not connect David Bain to the crime scene in any reliable way.[62]

(c) *Laniet gurgling*. Noting that a number of witnesses said that it was possible for a body to make noises after death, Binnie J went on to say "I do not believe the 'gurgle' evidence assists the Crown Law Office's

[57] Ibid at [282]–[283].
[58] Ibid at [178].
[59] Ibid at [179].
[60] Ibid at [313].
[61] Ibid at [445].
[62] Binnie Report [475].

position".[63] It is one thing to say that an innocent explanation is *possible*, quite another to say that the item of evidence adds nothing to the Crown case as a matter of *probability*.

(d) *Trigger key*. As to this item he said "I do not accept the 'trigger key' issue as *inculpatory* of David Bain."[64]

84. Differently expressed, there is an assumption throughout the Binnie Report that an item of evidence should be disregarded entirely unless it is established that on the balance of probabilities, that item of evidence would be incriminating in itself. That is the ultimate effect of his approach. No room is allowed for the possibility that something which is consistent with innocence in isolation might nevertheless increase the odds in favour of guilt.

85. Take David's fingerprints in blood on the rifle. It is common ground that whoever he was, the murderer was engaged in a struggle with Stephen, that much blood was spilt, that some of that blood is likely to have finished up on the murderer, and that the murders were carried out with a particular rifle. Most people would think that in those circumstances evidence that David's fingerprints were found in unidentified blood on the very rifle in question would increase the odds that David was the culprit. Yet Binnie J dismissed that item from further consideration. His explanation for his dismissal is that "[o]n a balance of probabilities I conclude that the prints are not in human blood and that David Bain is entitled to succeed on this issue as well."[65]

86. For reasons outlined earlier, that has never been the way in which circumstantial evidence is assessed.

Step two: combining the effect of all the probabilities

87. It will be recalled that the second step in the deductive process was to combine in one assessment the odds that had stemmed from each item of evidence considered individually. Great weight might have been given to some items and very little to others. But the important point was that at this stage in the exercise, every item that increased or diminished the likelihood of innocence was to be brought into play.

88. Binnie J did not follow that process. It is true that at the end of the exercise he stated that his conclusion had been based on "… the cumulative effect of the items of

[63] Binnie Report at [374].
[64] Ibid at [449].
[65] Ibid at [309].

physical evidence, considered item by item both individually and collectively".[66] Even had that approach been followed, it would have arbitrarily limited the exercise to selected "physical evidence". In fact, however, in the body of his Report he makes it clear that that was not the methodology he used.

89. The way in which Binnie J related one item of evidence to another began with luminol footprints. In his view the luminol footprints "were *probably* made by Robin rather than David Bain" (his emphasis).[67] That was to become "the foundation of my conclusion of factual innocence".[68] Other items were then measured directly or indirectly in turn against that starting point.

90. The point might be illustrated by Binnie J's treatment of evidence that Stephen's blood was found on the front crotch area of David's black rugby shorts. Discussing that evidence, Binnie J reverts to his finding in relation to the luminol footprints and goes on to say: [69]

> It is implicit in that finding [luminol footprints] that the blood on David's socks is accounted for by innocent transfer from other objects in areas of the house already smeared with blood. Innocent transfer may also account for the blood stains found on David Bain's clothing. … The question is whether the concern created by this item of information has enough force to displace the other elements of proof that tilt the balance in favour of factual innocence. I do not think it does.

91. Two features emerge from that form of reasoning. First, the conclusion in relation to luminol footprints has been used as leverage for a similarly exculpatory view in relation to the rugby shorts. In other words, the fact that the luminol footprints evidence was thought to indicate that blood on David's socks came from innocent transfer was seen as a reason for thinking that blood on David's shorts had come from innocent transfer as well. Secondly, a provisional conclusion having been formed as to innocence, another item of evidence is compared with that proposition in order to see whether it "has enough force to displace the other elements of proof that tilt the balance in favour of factual innocence". A similar pattern pervades the rest of the report.

92. In the overall exercise, the reasoning began with Binnie J's selection of ten "primary issues".[70] Of these, "the foundation of my conclusion of factual innocence" was the luminol footprint starting point.[71] It was not suggested that that item was

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[66] Binnie Report at [476].
[67] Ibid at [262].
[68] Ibid at [473].
[69] Ibid at [395]–[397].
[70] Binnie Report at [186].
[71] Ibid at [473].

conclusive in itself. But having arrived at that (presumably provisional) conclusion, he went on to see whether the other nine items were capable of changing it.

93. In the event Binnie J decided they were not. His foundation was reinforced by the computer/paper run timing evidence.[72] Of the other eight items, Binnie J considered that the Crown's concession that suicide was not impossible was an adequate answer to that aspect of the evidence;[73] that Laniet's gurgling had been "rebutted by the evidence";[74] the evidence of shielding part of the rifle from blood spatter did not contradict "the other evidence relied on by David Bain to establish factual innocence";[75] the evidence of body temperature timing "frail as it is, favours David Bain";[76] the palm print on the washing machine was neither exculpatory nor inculpatory;[77] David's physical injuries were "of little probative value";[78] and the fingerprint in blood on the rifle and the blood on David's clothing "while raising suspicions, are capable of innocent explanation and do not, in my view, undermine David Bain's claim to factual innocence established on the other evidence".[79]

94. As the foundation of Binnie J's provisional conclusion was reinforced by one item, and unscathed by the others, the result was that "At this stage of the analysis I believe David Bain has met the lower probabilities standard."[80] His provisional conclusion remained intact.

95. The same pattern then followed on a larger scale. Binnie J moved on to test his provisional conclusion against "a number of other issues raised by the Crown as standing in the way of David Bain's claim to factual innocence".[81] These "secondary"[82] issues consisted of the broken glasses; the opera gloves; knowledge of the trigger safety key; position of the empty 10 shot magazine; the misfed bullet; the feigned fit; and the full bladder. Having traversed these, his conclusion was that they were capable of "creating suspicion … [but] fail to connect David Bain to the killings in the manner suggested by the Crown".[83] Several of these items, Binnie J

[72] Ibid at [474].
[73] Ibid at [475].
[74] Ibid at [475].
[75] Ibid at [313].
[76] Ibid at [365].
[77] Ibid at [358].
[78] Ibid at [389].
[79] Ibid at [475].
[80] Ibid at [413].
[81] Ibid at [414].
[82] Ibid at 126.
[83] Binnie Report at [462].

decided, "simply do not connect David Bain to the crime scene in any reliable way."[84] It followed that his provisional conclusion again remained intact.

96. There was no third exercise in which the provisional conclusion was tested against the rest of the evidence. Binnie J had dismissed the motives and mental stability of David and Robin, David's pre-event statements, and David's post-event admissions, as unwise to consider further.[85]

97. At its heart, the process followed by Binnie J was to arrive at a provisional conclusion based on a single item of evidence followed by a serial testing of that conclusion against some, but not all, of the other items of evidence.

98. To adapt the more usual rope analogy, Binnie J has adopted a provisional conclusion based on a single strand which he perceived to be the thick one and then tested some of the other strands singly and in turn against that strand. The approach is contrary to legal and mathematical principle. As judges routinely explain to juries, while each strand may not be strong enough to bear the load placed upon it, the strands taken together gather strength from each other.

Justice Binnie's treatment of assertions of fact by the Crown

99. I previously concluded that the onus of proof remained on David Bain throughout this inquiry. That did not change in situations where the Crown may have suggested a possible factual hypothesis. Where the available evidence pointed to a logical inference in favour of David Bain (such as that he was seen returning from his paper run), the Crown carried the risk of failure on that point as a matter of factual judgment. Unless it adduced further evidence to support an alternative explanation (such as that he had returned earlier and had gone back out again), the inference in favour of David Bain would probably be adopted. But there was never an onus on the Crown.

100. Binnie J had a different approach based on his understanding of New Zealand law. His primary sources for the law on the point were a passage in a New Zealand textbook on the law of evidence[86] and a New Zealand High Court decision.[87] From

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[84] Ibid at [475].
[85] Ibid at [178].
[86] Ibid at [237] citing McGechan RA *Garrow and McGechan's Principles of the Law of Evidence* (7th ed, Butterworths, Wellington, 1984) at [2.2] where *in the context of allegations in pleadings* the authors rightly state that the "burden of proof in any particular civil case in general lies upon the party, whether plaintiff, or defendant, who makes the allegation. The burden of proof lies on him who affirms, not upon him who denies."
[87] *Humphrey v Fairweather* [1993] 3 NZLR 91 (HC).

these and related sources he concluded that any allegation of fact by the Crown in the current inquiry placed an "evidentiary (sic) onus" on the Crown to prove it.[88]

101. The textbook passage Binnie J relied upon was concerned with the use of allegations in pleadings to determine the legal onus of proof. The way in which facts are alleged in documents which lawyers call "pleadings" usually indicates who has the onus of proof. But this is concerned with the legal onus, not the evidential onus.[89] There is no suggestion that the legal onus here lay on anyone other than David Bain. The decision Binnie J relied upon, *Humphrey v Fairweather*,[90] is an illustration of the uncontroversial proposition that in a civil dispute the legal onus of establishing an affirmative defence such as limitation falls on the defendant. The other sources Binnie J referred to are to similar effect.

102. I am bound to say that Binnie J has misunderstood the law in New Zealand on multiple onuses of proof. The onus of proof in this inquiry lay on David Bain and David Bain alone. The most that can be said is that where the available evidence pointed to a logical inference in favour of David Bain (such as that he was seen returning from his paper run), the Crown carried the risk that unless it adduced further evidence to support any alternative explanation (such as that he had returned earlier and had popped back out again), Binnie J would be justified in adopting the inference that favoured David Bain. But that has nothing to do with onuses of proof. It is simply a matter of factual assessment based on the current state of the evidence.

103. Consistent with his understanding of New Zealand law, Binnie J imposed an onus of proof on the Crown at a number of points. That approach was taken wherever the Crown (referred to in the report as "Crown Law Office") pointed to the possibility of an alternative explanation for a factual assertion that had been made on David Bain's behalf. Binnie J found that in each case the Crown had failed to prove the alternative. The following are examples:

(a) *Alibi and timing.* It was contended for David Bain that the time at which he was seen entering the house after his paper run was too late for him to have started the computer. The Crown responded that to establish that alibi it was for David to exclude the possibility that he had entered the house earlier, gone out again, and was then seen entering for a second time. Binnie J's view was that the Crown had failed on this point because "… it is up to the Crown Law Office to prove facts that establish the 'pop in and out' theory it

[88] Binnie Report at [218] and [238].
[89] For a discussion of legal and evidential onuses, see above at [60]–[62].
[90] *Humphrey v Fairweather* [1993] 3 NZLR 91 (HC).

positively asserts – not up to David Bain to refute such free standing speculation."[91]

(b) *New or old running shoes.* Similarly it was contended for the applicant that the fact that the inside of his Laser running shoes showed no signs of blood meant his socks could not have been bloodied before he ran his paper route. The Crown argued in response that David Bain may have been wearing an old pair of shoes on his route, rather than the Lasers. Binnie J dismissed the Crown's hypothesis saying there was "no persuasive evidence to accept" such speculation.[92]

(c) *Rifle prints in human blood.* "The Crown Law Office contends that just because no human DNA was detected doesn't mean no human DNA was present. This may be so, but it is the Crown that is making the positive assertion that David's fingerprints were impressed on the murder weapon in human blood."[93]

(d) *Broken glasses.* The Crown's case was that the finding of the damaged spectacles in David's room, together with the finding of the left lens in Stephen's bedroom, linked David rather than Robin to the killing of Stephen. Binnie J's response was: "It is the Crown Law Office that makes the positive assertion that the broken glasses and lenses link David Bain to the killing of Stephen. … The unexplained location of the frames and lenses … is just that – unexplained."[94]

104. It is perfectly possible that in these and other cases the same conclusions would have been reached without placing any "onus" on the Crown. For example when it came to the alibi and timing, Binnie J might have been entirely justified in concluding that the "pop in and out possibility" was so remote that it should be given little or no weight. But until the evidence is independently reviewed on the merits, it is impossible to be sure. It was an error of principle to impose an onus of proof on the Crown at any point in this inquiry.

Justice Binnie's treatment of gaps in the available information

105. Binnie J was highly critical of the police and other authority figures. These criticisms were not confined to his discussion of misconduct of authorities for extraordinary circumstance purposes. They also pervade his discussion of guilt or

[91] Binnie Report at [220].
[92] Binnie Report at [228] and [260].
[93] Ibid at [307].
[94] Binnie Report at [442].

innocence. On many occasions he pointed out that more evidence would have been available had adequate investigations been made by authorities.

106. In some instances where Binnie J considered gaps in the available information to be inexcusable he appears to have inferred that the absent evidence would have favoured David Bain. Two examples suffice:

(a) *Time of return from paper run.* With respect to police investigations into the time at which David Bain had returned from his paper run, Binnie J commented "If they did not exercise due diligence in that exercise (as will be discussed in Part Two), their failure should not be visited on the head of David Bain."[95]

(b) *Condition of Robin's hands.* Having criticised the police failure to identify marks on Robin's hands, the source of blood on Robin's hands, or finger nail scrapings, Binnie J said "[t]he Police, having made serious errors of judgment in this regard, are in no position to speculate that the evidence thus destroyed would have been of no consequence, or been of no help to exculpate David Bain."[96]

107. There is no suggestion that in instances of this kind the police had either deliberately destroyed evidence that they knew would still be relevant or deliberately refused to produce it. It follows that there was no room to draw any adverse inference from the unavailability of the evidence.

Conclusions regarding Justice Binnie's approach to probabilities

108. In my view Binnie J's assessment of probabilities is flawed by the following analytical errors:

(a) Instead of assessing the extent to which each item of relevant evidence increased the likelihood of guilt or innocence as a matter of degree, Binnie J discarded any item that was not established on the balance of probabilities.

(b) Instead of considering the cumulative effect of all relevant items, Binnie J arrived at a provisional conclusion of innocence based on one (luminol footprints) and then proceeded to compare it with others in turn to see whether the provisional conclusion was rebutted.

[95] Binnie Report at [343].
[96] Ibid at [467].

(c) Instead of requiring David Bain to satisfy him on the balance of probabilities throughout the inquiry, Binnie J imposed an onus on the Crown wherever the Crown asserted a fact.

(d) Instead of founding his conclusions exclusively upon the evidence available to him, Binnie J drew an inference adverse to the Crown (or favourable to David Bain) in cases where, in his view, the Crown was responsible for the lack of available evidence.

109. The first result of that flawed approach was that Binnie J excluded from further consideration a great deal of evidence that most people would have regarded as highly relevant. Discarded in this way were David's fingerprints on the rifle, blood stains on David's clothing, the broken glasses, Robin's motive, Robin's mental stability, David's post-event admission, factors consistent with suicide, shielding of part of the rifle, David's hearing Laniet gurgling, David's gloves and knowledge of the whereabouts of the trigger key.

110. Secondly, the way in which Binnie J approached the cumulative significance of all the evidence in combination seriously skewed the exercise towards an innocence outcome. That followed from an approach which began with a provisional conclusion of innocence based on a single item of evidence followed by serial comparison with other items considered in isolation from each other.

111. Less serious were the occasions on which Binnie J either imposed an onus on the Crown or drew an adverse inference against the Crown in certain cases where there were gaps in the evidence. It seemss unlikely that these errors affected his overall conclusion although it is possible that they influenced his judgment in marginal situations.

CHAPTER 4: OTHER CURIOSITIES IN JUSTICE BINNIE'S TREATMENT OF THE FACTS

Assessment of the evidence in general

112. Binnie J's treatment of the facts was curious in three further ways, namely reliance on the suspect's own evidence; reliance on "innocent openness" defences; and significance attached to the jury acquittal. These will be dealt with in turn.

Reliance on suspect's own evidence

113. In establishing the factual background to a case, most decision-makers will prefer to use sources of evidence other than the suspect's own evidence. A suspect who lies in denying his responsibility for the crime itself would scarcely shrink from lying about the factual background.

114. That is not to say that a suspect's account should be ignored. It is clearly an important part of the evidence. However it is evidence in a special category. At the very least, where a suspect is the source of a factual allegation, one would expect to see an acknowledgment that assertions from that quarter are to be treated with special caution.

115. Binnie J regarded David Bain as a credible witness.[97] Throughout his report Binnie J relies heavily upon information sourced from David. Thus Binnie J's uncritical assumptions that Margaret referred to Robin as a "son of Belial or the devil";[98] that the five circles target was drawn up by Robin when helping David to "sight" the new Winchester .22 gun;[99] and that David was wearing his new pair of running shoes on the paper run,[100] all turn out to have come from David.

116. David's statements are also used by Binnie J to rebut propositions put forward by the Crown. For example, the Crown's suggestion that it was David who had called the family meeting is rejected because David "explained at length the arrangement made by Margaret and Arawa to collect Laniet from work and there is no reason to doubt his explanation."[101] On the Crown's supposition that David was wearing a black skivvy over his T-shirt on the night of the murders, Binnie J says David "denies under oath wearing it".[102]

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[97] Ibid at [37] and [119].
[98] Binnie Report at [84].
[99] Ibid at [147].
[100] Ibid at [227] & footnote 111.
[101] Ibid at [177].
[102] Binnie Report at [407].

117. The one exception appears to be an occasion when David's version was directly contradicted by others. While quoting David's statement that he did not wear his mother's glasses,[103] Binnie J goes on to "assume (without deciding)" that David did wear them at some point during the weekend given that David was the only one among a number of witnesses that Binnie J heard on the point.[104]

118. For the most part, however, David's statements go unquestioned. It is assumed, for example, that one of David's chores was to do the washing after his paper run each morning;[105] that Robin used the computer more than other family members who used it for only occasional computer games;[106] and that the alleged delay between finding his father dead and calling emergency services was readily explainable.[107] Scene setting of that kind is then used as the basis for subsequent analysis of the physical evidence.

119. The modern approach to the assessment of witnesses is a humbling one. It has increasingly been recognised that, contrary to their own expectations, judges and juries actually have little or no ability to assess credibility through observing a witness's demeanour.[108] They cannot tell when a witness is lying.[109] Without disregarding demeanour altogether, courts and other decision-makers now tend to place greater weight on other considerations such as the inherent likelihood of the witness's story, consistency with his or her contemporaneous and subsequent behaviour, and independent sources of evidence.[110]

120. In the present case the murders took place 18 years before Binnie J's interview with David Bain. Since that time the issues and evidence have been well and truly rehearsed, with and without David, in countless forums. It is no reflection on David

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[103] Ibid at [421].
[104] Ibid at [423].
[105] Ibid at [55(vii)] and [110].
[106] Ibid at [322].
[107] Ibid at [350].
[108] See for example Heaton-Armstrong, Shepherd, Gudjonsson and Wolchover, *Witness Testimony* (OUP, Oxford, 2006) at 26; Olin Guy Wellborn III "Demeanour" (1991) 76 Cornell L Rev 1075 at 1080.
[109] (Stone, "Instant Lie Detection? Demeanour and Credibility in criminal Trials" [1991] Crim L R 821, p829; Littlepage and Pineault "Detection of deceptive factual statements from the body and the face" 5 Personality and Soc. Psychology Bull 463 (1979); McClellan, "Who is Telling the Truth: Psychology, Common Sense and the Law" (2006) 80 ALJ 655, pp 660 and 662; Maier and Thurber "Accuracy of Judgments of Deception when an Interview is Watched, Heard and Read" 21 Personnel Psychology 23 (1968); Paul Ekman "Telling Lies" 162-189 (1985); Bond and Fahey "False Suspicion and the Misperception of Deceit" 26 Brit J Soc Psychology 41 (1987); Miller and Fontes "The Effects of Video Taped Court Materials on Juror Response" 11-42 (1978); Zuckerman dePaulo & Rosenthal "Verbal and Non-Verbal Communication of Deception" 14 Advances Experimental Soc Psychology 1, 39-40 (1981).
[110] *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87; *Fox v Percy* [2003] HCA 22, (2003) 214 CLR 118 at [30]–[31].

to say that he will be a very different witness today compared with the witness he would have been 18 years ago.

121. Most decision-makers would look for corroborating evidence before accepting statements from a suspect. There are no overt signs of caution or scepticism in Binnie J's approach to David Bain's evidence. On the contrary, quotes from David declaring his innocence appear at the beginning and end of the Executive Summary to the Report.[111]

"Innocent openness" defences

122. There is an argument that is very familiar to anyone who has spent much time in the criminal courts. Faced with incriminating admissions or oversights by their clients, defence counsel routinely argue that if their clients had been guilty they would not have been so silly as to make the admissions or oversights in the first place. Far from indicating guilt, it is said, the seemingly incriminating admission or oversight is in fact a sign of innocence. I will refer to this as the "innocent openness" defence.

123. The theory underlying an "innocent openness" defence can be attractive to a commentator, judge or jury after the event. Viewing events with the benefit of hindsight, unlimited time for consideration, and adrenalin-free, one can see with clarity that a guilty person would have been unwise to act in the way that this suspect has acted. And it is true that an innocent person could make a seemingly incriminating admission, or leave an apparently incriminating clue, in circumstances where a guilty person would have had the foresight to cover their tracks.

124. Experience suggests, however, that in practice guilty people do make mistakes. Acting under huge stress, and often in extreme haste, even the most hardened criminal lowers his or her guard.

125. Nor is it unknown for manipulative suspects to make deliberate concessions in non-critical areas in order to promote an appearance of openness and reasonableness.

126. At a number of points in his Report, Binnie J's analysis of the physical evidence is informed by "innocent openness" arguments. For example:

(a) In relation to the Crown's "four before one after theory", he states:

> It strikes me as inherently implausible that David Bain, however incompetent, would kill four people, then take time out to do a paper route in clothes smeared in blood (albeit covered in part by a red

[111] Binnie Report at [29] and [71].

> sweat shirt), anxious to be seen by customers along the way, leaving the scene of the massacre to discovery by Robin before his return …[112]

> Such a mindless "four before one after" plan attributed to David, a university student, is just not credible in the absence of (i) any expert evidence that David suffered from an abnormality of the mind or (ii) possessed sub-normal intelligence. Neither is the case.[113]

(b) On the question of the clothes that David Bain was wearing when police arrived, he comments:[114]

> …it strikes me as curious why David Bain, if he was the killer, would not have earlier disposed of the clothing he was still wearing when the Police arrived. On the Police theory, he had plenty of time and opportunity to do so. Why, in particular, would he not have put this clothing in the wash before leaving on his paper route?

127. As to his hearing Laniet gurgling, Binnie J comments that it would be remarkable for David Bain to volunteer such a potentially incriminating statement if he were guilty.[115]

128. The fact that David Bain made a number of statements against his own interest also appears to have counted in his favour. For example:

(a) Binnie J notes that David Bain "admitted candidly that his memory in some instances could be coloured by all that he has learned in the intervening trials and appeals"[116] and goes on to say that: [117]

> Whatever temptation existed for him to shape his 'recovered memory' to meet the case presented by the prosecution is off-set, in my opinion, by his refusal even at this stage to gild the lily in presenting his version of events to advance his own interests.

(b) Similarly, he regarded it as "of significance" that David Bain rejected the whole idea that his father could murder his family,[118] adding "in other

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[112] Binnie Report at [43].
[113] Ibid at [44]. See also statement to similar effect at [133]: "…what sort of calculating killer leaves the murder scene open to all the world for an hour while he goes off to do his paper route?"
[114] Ibid at [399]. The bloodstain on the seam of the front crotch area of the black rugby shorts was visible only under the spotlight, and even then only "faintly". If David Bain had been the killer, he may have disposed of only that clothing which appeared to be incriminating.
[115] Ibid at [200]. In this respect Justice Binnie appears to be in good company, as the Privy Council also regarded it as remarkable for David Bain to have made such a concession if he was indeed the killer.
[116] Ibid at [123].
[117] Ibid.
[118] Binnie Report at [124].

words, despite the accepted view that the killer was either his father or himself, David Bain went out of his way in my interview with him not to speak ill of Robin."[119]

(c) Referring to statements David Bain made to the Police to the effect that he was the only one who knew the whereabouts of the key to the trigger lock he comments that "it made no sense for him to volunteer such a comment to the Police if he were guilty."[120]

(d) In relation to the events on the night before the murders he refers to David Bain's recollection that there were raised voices, and comments that: [121]

> It would clearly be in David Bain's interest to claim that he could identify the voices of Laniet and his parents but he states, on the contrary, that he cannot say *whose* voices were raised, or what they were arguing about.

129. It is entirely possible that concessions of that kind were a sign of transparency and lack of guile on David's part. However, it would have been reassuring to see in the Report some reference to the possibility that they were manipulative.

Significance attached to the jury acquittal

130. A determination about guilt by a jury in a criminal trial is entirely different from a determination about innocence in the context of an application for compensation. At one point Binnie J acknowledges this when he says: [122]

> Little can be inferred from the 2009 acquittal in respect of particular issues or, indeed about factual innocence. Under the Cabinet's "extraordinary circumstances" discretion, even if the jury rejected all of the prosecution's major points, this would not raise a presumption of David Bain's innocence.

131. Yet at other places in his Report, Binnie J does appear to attach significance to the fact that David Bain was acquitted at the second trial. Examples are:[123]

> In the various attacks on David Bain's credibility the explanations consistent with innocence are more plausible I think, than the inculpatory

[119] Ibid at [126].
[120] Ibid at [38].
[121] Ibid at [168].
[122] Ibid at [204].
[123] Binnie Report at [39] and [83]. See also the way in which Binnie J framed his task in terms of the jury verdict at [5].

> interpretations put forward by the Police (*and obviously rejected by the 2009 Christchurch jury that acquitted him*). (emphasis added)
>
> …having elected to take the case to a second jury, *the prosecution has to face up to the consequences* of the 2009 jury's acquittal. (emphasis added)

132. The jury acquittal was not relevant to the current inquiry. There are several reasons for this. First, a person appointed to conduct an inquiry of this kind is asked to conduct his or her own inquiry, not to borrow from the view formed by others. Secondly, the onus of proof before a Referee is the reverse of the onus that had been before the jury. Thirdly, the scope of a compensation inquiry is potentially much wider than that of a jury in a criminal trial. Evidence which may be considered by the Referee in a compensation inquiry is not confined to evidence that might be admissible in a court of law. Nor is the Referee's inquiry limited by anything which the jury might have previously decided. The Referee is free to range into areas which are otherwise forbidden by a jury hearing a criminal case.

133. It is far from obvious that Binnie J was influenced by the 2009 acquittal. The references to the acquittal may have been nothing more than rhetorical flourishes. However their inclusion in the Report was inappropriate in my view.

Summary of Justice Binnie's approach to other features of the evidence

134. This chapter has addressed three oddities in Binnie J's treatment of the facts. Of these:

(a) His frequent reliance on the suspect's own evidence was a matter of evaluation only. It breached no rule. However in many people's eyes it would be regarded as generous to David Bain.

(b) The same applies to the repeated reliance on innocent openness defences. Again no rule has been breached but many might question the rigour with which the evidence has been tested.

(c) His attachment of significance to the jury acquittal was wrong in principle although unlikely to have affected the outcome.

135. Taken together these oddities diminish confidence in the Report's factual conclusions.

CHAPTER 5: THE REQUIRED APPROACH TO CONDUCT OF AUTHORITIES

Question posed to Justice Binnie

136. The Minister's letter of instructions to Binnie J asked him to advise whether there were "any factors particular to David Bain's case (apart from your assessment of innocence beyond reasonable doubt) that you consider are relevant to the Executive's assessment of whether there are extraordinary circumstances such that it is in the interests of justice to consider his claim."

137. The instructions to Binnie J provided three examples of ways in which circumstances might be regarded as extraordinary for present purposes. Of the three, the one which Binnie J relied upon was defined in the following terms:[124]

> *Serious wrongdoing by authorities* – i.e. an official admission or judicial finding of serious misconduct in the investigation and prosecution of the case. Examples might include bringing or continuing proceedings in bad faith, failing to take proper steps to investigate the possibility of innocence, the planting of evidence or suborning perjury.

138. The instructions also made it clear that the three examples provided were not intended to be exhaustive, stating:[125]

> The test of "extraordinary circumstances" is inherently open-ended and the list above cannot be treated as exhaustive. There may be rare cases where there are other extraordinary features that render it in the interests of justice that compensation be paid…

139. Binnie J concluded that in the Bain case there had been relevant misconduct by authorities. He regarded the misconduct as an extraordinary circumstance that, in combination with the finding of innocence, made it in the interests of justice that compensation be awarded.[126]

140. Before turning to Binnie J's specific findings, it will be convenient to consider the principles to be applied in general terms. The starting point is to consider the origins of the ex gratia compensation scheme. That will be followed by the two possible sources of authority for Binnie J's findings – (i) the "serious wrongdoing" example provided in his instructions and (ii) the broader scope to consider "rare cases" outside that example.

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[124] Letter from Simon Power to Binnie J instructing on the claim for compensation by David Bain (10 November 2011) at [39]. The other two examples were "unequivocal innocence" and "no such offence", addressed at [149]–[150].
[125] Ibid at [40].
[126] Binnie Report at [31].

Origins of the ex gratia compensation regime

141. The ex gratia compensation regime has been helpfully described by Jeff Orr, Chief Legal Counsel of the Ministry of Justice as follows: [127]

> There is no legal right to compensation for wrongful conviction and imprisonment in New Zealand. Compensation payments have always been treated as *ex gratia* or discretionary. However, in the interests of fairness and consistency, and in light of the duty to compensate normatively imposed by the International Covenant on Civil and Political Rights, the Government decided that it should nevertheless adopt a standard process for applications and decisions. Accordingly, in the last decade, Cabinet adopted guidelines for determining eligibility for, and quantum of, payments for wrongful conviction and imprisonment. Because payments are *ex gratia* and involve the expenditure of, often, substantial amounts of public money for which they are accountable, decisions appropriately rest with Ministers.

142. The particular duties under the International Covenant on Civil and Political Rights in this context stem from Article 14(6) which provides:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact, in time is wholly or partly attributable to him.

143. New Zealand ratified the ICCPR on 28 December 1978 but made a reservation to Art 14(6) in the following terms:

> The Government of New Zealand reserves the right not to apply article 14 (6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice.

144. The reservation was apparently entered as a precaution to ensure that in New Zealand payments of compensation would remain ex gratia and that the Crown would continue to be immune from liability.[128]

145. A number of changes have been made to the Cabinet guidelines since they were first introduced in 1997. The Interim Criteria introduced in 1997 originally provided compensation for those who had had their convictions quashed followed by

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[127] Jeff Orr "Compensation for wrongful conviction and imprisonment" in New Zealand Law Society publication "Symposium, Criminal Law" (November 2006) 77 at 77.
[128] *Akatere v Attorney General* [2006] 3 NZLR 705 at [16].

an acquittal at a retrial.[129] The Law Commission recommended a change to those criteria so that only those who had had their conviction quashed without order of retrial would be eligible. The Law Commission recommended the change because "those whose case is remitted to the lower court for a retrial are more likely to be guilty of the offence than those whom the appellate court has the confidence to acquit."[130]

146. At the heart of compensation under the ICCPR is the requirement that "a new or newly discovered fact shows conclusively that there has been a miscarriage of justice".[131] The word "conclusively" imports a standard of certainty higher than a mere acquittal, successful appeal, acquittal on a retrial, or finding on the balance of probabilities. The threshold imported by the word "conclusively" was presumably set as high as it was in order to avoid the floodgates that might be opened if the standard of proof for innocence were set any lower.

147. The way in which that standard has been implemented in New Zealand is to require the applicant's case for innocence to survive two filters. The first is that the conviction must be quashed on appeal without order for retrial. The principal basis for ordering that there be no retrial is that the available evidence would be insufficient to justify a conviction by a reasonable jury.[132] So in a case that qualifies under the Cabinet Guidelines, there will already have been a judicial finding that the available evidence does not support a finding of guilt. The second filter imposed by the Guidelines themselves is that a duly appointed Queen's Counsel must be persuaded of innocence on the balance of probabilities.

148. Cases outside the Guidelines have not passed through the first of those filters, namely a judicial finding that the available evidence would be insufficient to justify a conviction by a reasonable jury. Consequently for the exercise of the extraordinary circumstances discretion, one would expect something special that qualifies as an adequate substitute for the first filter.

149. A potential substitute for the first filter is to require the applicant to satisfy a duly appointed Queen's Counsel of innocence beyond reasonable doubt. That is the first of the three examples of extraordinary circumstances provided to Referees in their instructions. It preserves the original ICCPR intent that the miscarriage of justice has been established "conclusively". That explains why Cabinet has reserved

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[129] Orr, above n 128, at 79.
[130] Orr, above n 128, at 88.
[131] See above at [143].
[132] *Reid v R* [1980] AC 343 (PC) at 349-350; Bruce Robertson (ed) *Adams On Criminal Law* (online loose-leaf ed, Brookers) at [CA 385.23].

to itself the discretion to allow compensation outside the Guidelines in an extraordinary circumstance of that nature.

150. A second potential substitute for the first filter is to show that the purported conviction was invalid on the ground that no such offence existed in law. Again the miscarriage of justice has been established "conclusively" notwithstanding the lack of any judicial reinforcement through the Court of Appeal. That explains the second example of a qualifying extraordinary circumstance.

151. The third example of a potentially qualifying extraordinary circumstance – serious wrongdoing by authorities – is less easy to reconcile with the International Covenant from which New Zealand's ex gratia compensation process sprang. Article 14(6) of the Covenant is concerned with the question whether "a new or newly discovered fact shows conclusively that there has been a miscarriage of justice". The miscarriage of justice in question is impliedly the applicant's wrongful conviction. Article 14(6) is concerned with the question whether there is fresh evidence demonstrating innocence, not whether authorities have misconducted themselves as an end in itself.

152. New evidence showing that a conviction was wholly or partly due to the planting of false evidence by authorities would be relevant to the Covenant's purpose in that it would help to demonstrate innocence. But determining guilt or innocence does not appear to be the object of New Zealand's additional "authority misconduct" example of extraordinary circumstances. Guilt or innocence has already been addressed in the earlier questions posed to a Referee and by the first example of extraordinary circumstances, "innocence beyond reasonable doubt". Nor does the fact that authorities have misconducted themselves indicate of itself that the applicant is necessarily innocent.[133]

153. In New Zealand the "authority misconduct" ground appears to have been introduced into the compensation regime as an additional consideration to be determined for its own sake. It can only be assumed that although it lies outside the object of the International Covenant, the New Zealand Cabinet decided to use the ex gratia compensation process as an opportunity for the extraneous purpose of identifying and publicly condemning official conduct that threatens the integrity of the judicial system.

154. Other systems are already in place for regulating the conduct of the police and other officials. These include admissibility rulings in criminal proceedings, civil liability for malicious conduct, false imprisonment and misfeasance in public office,

[133] Illustrated by *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 in which a retrial was ordered notwithstanding gross police misconduct.

internal departmental systems and disciplinary systems conducted or overseen by the Independent Police Conduct Authority (formerly the Police Complaints Authority), the State Services Commission and various forms of disciplinary tribunal appointed by or for professional bodies.

155. The founding object of the ex gratia compensation discretion was to compensate the innocent, not to discipline misconduct by authorities. This suggests that the ex gratia compensation discretion will be used for the purpose of regulating the conduct of the police and other officials only sparingly. That is the context in which one turns to the actual wording of the serious wrongdoing example.

Elements of the serious wrongdoing example

156. It will be recalled that the relevant extraordinary circumstances ground provided to Binnie J was worded as follows:

> *Serious wrongdoing by authorities* – i.e. an official admission or judicial finding of serious misconduct in the investigation and prosecution of the case. Examples might include bringing or continuing proceedings in bad faith, failing to take proper steps to investigate the possibility of innocence, the planting of evidence or suborning perjury.

157. The wording of the authority wrongdoing example requires satisfaction of at least three elements:

(a) an official admission or judicial finding;

(b) serious misconduct; and

(c) occurrence of the serious misconduct in the investigation or prosecution of the case.

158. Each will be considered in turn.

(a) Official admission or judicial finding

159. The wording explicitly requires that the serious misconduct be established by either official admission or judicial finding.

160. "Official admission" appears to envisage an admission by a representative of the police with the authority to make such an admission on its behalf, or an admission by the Crown-appointed scientist, doctor or other expert concerned.

161. "Judicial finding" would seem to require a finding by a court of general jurisdiction. If made, such findings seem likely to emerge in the context of the

proceedings leading to the applicant's original conviction. Not infrequently, findings of that kind are made in pre-trial rulings, trial rulings, during a sentencing, or on appeal.

162. A finding of misconduct by the Referee appointed by the Minister to conduct one of these exercises does not fall within either of those categories. If a finding by the Referee would qualify in any event, the words "official admission or judicial finding" would be redundant. Nor could it make any difference if the Referee happened to be a retired judge (such as Binnie J or myself). Such a Referee is not sitting in court and is not sitting as a judge in any normal sense of the word.

163. The requirement that qualifying misconduct be the subject of either an admission or a judicial finding has some parallel with the first filter discussed in connection with the Cabinet Guidelines. A prior admission or independent judicial finding of misconduct seems to have been intended as a precondition before a Referee should embark on an inquiry into that topic.

164. The policy implicit in this requirement appears to be that there are already adequate opportunities to control official conduct through admissibility rulings in criminal proceedings, civil liability for malicious conduct, false imprisonment and misfeasance in public office, internal departmental systems and external disciplinary systems overseen by the Independent Police Conduct Authority, the State Services Commission and the various forms of disciplinary tribunal appointed by or for professional bodies.

165. It was evidently thought unnecessary to add another layer of oversight through individual Referees appointed for the fundamentally different purpose of compensating innocent prisoners. Where there are already official admissions or judicial findings of serious misconduct, it does no harm to have the Referee identify the associated factors which may be relevant to Cabinet's exercise of its discretion. But it does not appear to have been intended that Referees would embark upon their own inquiries into authority misconduct without one or the other of those preconditions.

(b) Serious wrongdoing

166. The second requirement is "serious wrongdoing". "Wrongdoing" that is not "misconduct" could not qualify. That follows from the introductory words of the terms of reference on this topic "serious wrongdoing by authorities – i.e. an official admission or judicial finding of serious misconduct …"

167. Of the two, "wrongdoing" is more familiar in a moral or religious context and "misconduct" more familiar in a legal one. It will therefore be convenient to focus on "misconduct".

168. The terms of reference provide examples of "serious misconduct". From the examples given it is clear that "serious misconduct" includes deliberate dishonesty, malice, ulterior motive and bad faith. Less obvious are the varying degrees of error possible in the phrase "failing to take proper steps to investigate the possibility of innocence". Must the wrongdoing be deliberate or in bad faith or is mere inadvertence sufficient?

169. In answering that question four considerations seem relevant. The first is the rationale for having an ex gratia discretion to award compensation in the first place. As noted earlier, the purpose underlying the ex gratia compensation discretion was to compensate the innocent, not to condemn official misconduct. To the extent that condemning official misconduct has been engrafted onto that process, one might expect it to be reserved for only those cases which are so egregious that they threaten the integrity of the judicial system.

170. Secondly, the authority wrongdoing ground uses the word "serious". The phrase "failing to take proper steps to investigate the possibility of innocence" is not used in isolation. It is cited as merely an example of "serious wrongdoing" and "serious misconduct". It is difficult to think of any context in which mere inadvertence, rather than a deliberate or malicious failure to take proper steps, could be regarded as "serious wrongdoing" or "serious misconduct".

171. Thirdly, the other detailed examples provided within the authority wrongdoing ground (bringing or continuing proceedings in bad faith, planting of evidence and suborning perjury) all involve misconduct that is deliberate or in bad faith. There is no obvious reason for a different approach when it comes to failure to investigate innocence. In this context failure to investigate innocence could sensibly be a reference to cases in which an official knew that there were lines of inquiry likely to demonstrate innocence and deliberately elected not to investigate in case innocence emerged.

172. Fourthly, in other fields the word misconduct is normally confined to conduct that is more serious than mere negligence or incompetence. The classic definition of misconduct from *Corpus Juris Secundum* is as follows:[134]

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[134] *Corpus Juris Secundum* (Volume 58, West Publishing Company, 1948) at 818; cited in Complaints Committee No 1 of the *Auckland District Law Society v C* [2008] 3 NZLR 105 at [32]; applied by

> Both in law and in ordinary speech the term 'misconduct' usually implies an act done wilfully with a wrong intention, and conveys the idea of intentional wrongdoing. The term implies fault beyond the error of judgment; a wrongful intention, and not a mere error of judgment; but it does not necessarily imply corruption or criminal intention, and, in the legal idea of misconduct, an evil intention is not a necessary ingredient. The word is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences.

173. In some contexts the word "misconduct" on its own has been confined to conduct that is deliberate or in bad faith, while in others it has been extended to gross negligence.[135] But the fact that in the present instance it must be not only "misconduct" but "serious misconduct" suggests that of the two, the former (deliberate or in bad faith) is more likely.

174. A final point is that in all cases the focus lies on the culpability of the subject. It follows that an unforeseen outcome or consequence of the conduct is irrelevant.[136]

175. Those considerations together suggest that when Cabinet adopted the "authority wrongdoing" example of an extraordinary circumstance they did not have mere negligence, or even gross negligence, in mind. The other detailed examples within the authority wrongdoing ground all involve conduct that is deliberate or in bad faith.

176. In the Ministerial illustration provided, the words focused upon by Binnie J are "failing to take proper steps to investigate the possibility of innocence". He appears to have elevated that phrase a test in itself. But those words cannot be read in isolation. The overriding requirement is that there be "serious wrongdoing" and "serious misconduct". It is therefore reasonable to conclude that not all forms of failure to investigate innocence were intended to qualify. The additional element

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Kirby P in *Pillai v Messiter (No2)* (1989) 16 NSWLR 197 (NSWCA) at 200; approved in *Re A (Barrister and Solicitor of Auckland)* [2002] NZAR 452.

[135] *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] 3 NZLR 117 (HC) affirmed on appeal in *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401.

[136] *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 at [81]–[82]; followed in *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] 3 NZLR 117 (HC) and affirmed on appeal in *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401.

imported by "serious misconduct" is that there be some form of deliberate misconduct or bad faith.

177. Mere negligence in failing to follow available lines of inquiry into innocence could not be said to involve deliberate misconduct or bad faith. Something more must be required. So in this context there would be bad faith if, knowing that there were lines of inquiry that were likely to demonstrate innocence, an official has deliberately elected not to investigate in case innocence emerged. It is difficult to see how any form of failure to investigate the possibility of innocence could amount to "serious misconduct" for present purposes.

(c) Investigation or prosecution of the case

178. The letter of instructions provides that in order to qualify as relevant, the serious misconduct in question must occur "in the investigation and prosecution of the case".

179. It is clear from the context that the "investigation" is the process of inquiry carried out by the police and various experts and agencies appointed by the police.

180. In its usual sense conduct of a "prosecution" consists of the series of procedural steps before trial, presentation of the prosecution side of the case during the trial, and then presentation of the prosecution case at sentencing.

181. After sentence, ancillary steps can arise in connection with appeals and the disposal of exhibits. These would not usually be regarded as steps taken in "prosecuting" a case. However the purpose of the compensation regime is to compensate the innocent bearing in mind any authority misconduct that might have contributed to the need for that compensation. It might therefore be argued that on a purposive approach, if authority misconduct after sentencing had improperly contributed to the continued incarceration of the applicant, that ought to qualify as well.

182. The result just referred to could be achieved by adopting a liberal interpretation of the expression "prosecution". Misconduct in conducting the "prosecution" could be taken to extend to the conduct of, or opposition to, appeals on behalf of the Crown and the treatment or disposal of exhibits after trial. In my view the more liberal approach is justified.

Causal connection with imprisonment

183. It is also implicit in the terms of reference that in order to qualify as relevant the misconduct must have had some plausible nexus, however indirect, with the sentence for which compensation is now claimed.

184. The alternative is effectively the argument that the ex gratia payment regime was intended as an opportunity for an inquiry into police or departmental conduct in general, regardless of any nexus with the imprisonment for which compensation is now sought.

185. I cannot believe that that was intended. That society should root out poor practices in its public institutions is undeniable. However there are many other agencies, procedures and opportunities for inquiries of that nature. Some, such as inquiries instituted by the Commissioner of Police, are internal to the institutions involved. Others, such as the Independent Police Conduct Authority, are conducted by external agencies under general rules and guidelines. Still others, such as Commissions of Inquiry, are conducted by ad hoc agencies set up for the purpose. But if an ad hoc agency is set up to inquire into official conduct, the terms of reference will be closely defined, procedural safeguards will be set in place for those involved, the decision-maker will be chosen for expertise in the area, and appropriate resources will be provided.

186. That may be contrasted with inquiries into applications for ex gratia compensation. If a Referee goes beyond the causes of the wrongful imprisonment currently in question, the potential scope of the inquiry becomes unlimited, the procedures are open-ended and, at least in some cases, the qualifications and resources of the Referee might be open to question.

187. In my view the ex gratia compensation regime was never intended to range as widely as that. It is not an opportunity for a wide-ranging inquiry into official conduct in general. To qualify as relevant, misconduct must have had some plausible nexus, however indirect, with the imprisonment for which compensation is now claimed.

Broader scope to consider "rare cases"

188. The Minister's instructions to Binnie J made it clear that the examples of qualifying extraordinary circumstances provided were not intended to be exhaustive, stating:[137]

> The test of "extraordinary circumstances" is inherently open-ended and the list above cannot be treated as exhaustive. There may be rare cases where there are other extraordinary features that render it in the interests of justice that compensation be paid…

189. It must always be open to a Referee to include in his or her report any factor particular to the present case which the Referee considers to be relevant to Cabinet's assessment of whether there are extraordinary circumstances such that it is in the interests of justice to consider his claim. The Referee is not limited to the three examples provided.

190. On the other hand it will obviously be unhelpful for Referees to provide Cabinet with factors which could not possibly have any bearing upon the extraordinary circumstances discretion. The nature and purpose of the discretion have been outlined earlier. They suggest that Referees should be slow to go outside the three examples provided given:

(a) The relatively narrow objectives of the ex gratia compensation scheme discussed earlier;

(b) The Minister's stated expectation that cases outside the three examples provided would be "rare"; and

(c) The fact that there would have been little point in having the Minister spell out the nature of the authority misconduct thought to qualify unless those requirements were adopted in all but the most exceptional of cases.

191. If a Referee did decide that this was one of those "rare" cases justifying a departure from those requirements, one might expect the Referee to expressly state the reasons for the departure.

Summary of requirements in relation to conduct of authorities

192. The approach to authority misconduct in general is informed by the original rationale behind the ex gratia compensation scheme, the wording of the instructions

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[137] Letter from Simon Power to Binnie J instructing on the claim for compensation by David Bain (10 November 2011) at [40].

provided to the Referee, the examples of authority misconduct provided, and the normal meaning of the words "serious misconduct" in other contexts.

193. Those sources together indicate that in the normal course authority misconduct will be relevant to the extraordinary circumstances discretion only where three elements are present:

(a) There is an official admission, or judicial finding, of serious misconduct;

(b) The misconduct was deliberate or in bad faith; and

(c) There is a plausible causal connection, however indirect and remote, between the misconduct and the existence or duration of the imprisonment.

194. There remains an overriding discretion to depart from the requirements for authority misconduct provided by the Minister by way of illustration. All the indications are, however, that such departures were intended to be rare and that the reasons for the departure would be spelled out by the Referee.

CHAPTER 6: JUSTICE BINNIE'S APPROACH TO CONDUCT OF AUTHORITIES

Justice Binnie's approach to conduct of authorities in general

195. Binnie J did not rely upon the first two illustrative examples of extraordinary circumstances in his terms of reference, "unequivocal innocence" and "no such offence". That left the third example, namely that there were there were factors relevant to "serious wrongdoing by authorities" capable of amounting to extraordinary circumstances.

196. Binnie J examined the precise wording of the serious wrongdoing by authorities example at some length. He concluded that in relation to that example, it was significant that the Minister had spoken of the "possibility" of innocence, not the "probability"; that "failing to take proper steps" was a classic description of negligence; that "proper steps" invited consideration of procedure not outcome; that his observations should be specific to this particular investigation; and that "serious misconduct by authorities" required "consideration not only of the seriousness of what was done (or not done) by state officials but also the gravity of the consequences for the individual".[138]

197. For reasons outlined in the last chapter, I am unable to accept a number of those principles. There were two broad ways in which authority misconduct might qualify as a relevant extraordinary circumstance. One was to come within the wording of the misconduct example provided by the Minister. The other was to qualify under the overriding discretion to admit rare cases outside that example.

198. Binnie J thought that the Bain case came within the first of those two possibilities, the Ministerial example of authority misconduct. I previously concluded that if the case were to fall within that example, three elements would need to be satisfied:

(a) An official admission, or judicial finding, of serious misconduct;

(b) Misconduct that was deliberate or in bad faith; and

(c) A plausible connection, however indirect and remote, between the misconduct and the existence or duration of the imprisonment.

199. It will be convenient to consider Binnie J's approach to each of those three requirements in turn.

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[138] Binnie Report at [480]–[492].

(a) Approach taken to official admission or judicial finding

200. Beyond noting that there was no official admission or judicial finding of serious misconduct in this case,[139] Binnie J ignored this requirement. His report is confined to his own conclusions on that topic. In my opinion this alone took his misconduct findings outside the specific example provided by the Minister.

(b) Approach taken to requirement that the wrongdoing be deliberate or in bad faith

201. Having analysed the meaning of "serious wrongdoing", Binnie J concluded that the test would be satisfied if "David Bain's 1995 wrongful conviction was brought about by an institutional failure on the part of the New Zealand authorities – a failure that constituted a serious and marked departure from the accepted standards of Police investigation of the day."[140] He explained that in his view "negligent as well as deliberate state misconduct may come within the Cabinet discretion."[141]

202. For reasons already set out at some length, I am unable to accept those propositions. In my view something more than negligence, or even marked negligence, is required. The misconduct must be deliberate or in bad faith. As applied to failure to investigate innocence, an official would, for example, act deliberately or in bad faith if, knowing that certain lines of inquiry would be likely to demonstrate innocence, he or she deliberately elects not to investigate in case innocence emerges.

203. In every major police investigation, as with every other major human endeavour, hindsight discloses things that could have been done better. This case is no exception. But the question is not whether some things could have been done better, as they clearly could have been, but whether the shortcomings were so egregious that they warranted a sanction in the form of ex gratia compensation to an applicant who would otherwise fail to qualify for it. That is a very different question.

204. Binnie J took the view that serious misconduct by authorities ought to "be interpreted to include consideration not only of the seriousness of what was done (or not done) by state officials but also the gravity of the consequences for the individual who is wrongfully convicted."[142]

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[139] Ibid at [479].
[140] Binnie Report at [489].
[141] Ibid at [482].
[142] Ibid at [485].

205. I am unable to accept that proposition either. The word "misconduct" is directed to the culpability of the offender, not the consequences for his victim. That is the case in every other context. Certainly foresight as to the interests and risks at stake has an important bearing on the duty and standard of care required for negligence purposes. But even for negligence, the criterion is foreseeability, not consequences viewed in hindsight. Still less could actual consequences have any bearing upon the presence or absence of serious misconduct.

206. In my view Binnie J has set the bar too low for the purpose of deciding whether there were factors relevant to serious misconduct by authorities.

207. Many of the errors and omissions which Binnie J categorised as serious misconduct were instances in which they were said to have failed to investigate the possibility of innocence. He criticised the Police for failing to investigate Laniet's allegation of incest;[143] test Robin's body and David promptly for firearm discharge residue;[144] preserve luminol footprint carpet samples;[145] preserve evidence on Robin's body;[146] obtain photos from the pathologist,[147] take proper steps to ascertain the timing relevant to the alibi defence;[148] and have Robin's arm measured to see whether it was long enough to reach the trigger of the rifle to shoot himself.[149] Rushing to judgment in deciding to charge David Bain was the same criticism in a different form.[150]

208. In a similar category is the ESR's provision of a contaminated DNA sample to the defence expert, Dr. Arie Geursen. Binnie J accepted that the conduct was "inadvertent" but described it as "seriously prejudicial to David Bain's fair trial rights" and "serious misconduct".[151]

209. In none of those instances did Binnie J suggest that the failure to investigate further was deliberate or in bad faith. There is no suggestion that an officer knew of lines of inquiry that would be likely to demonstrate innocence and decided not to investigate further in case innocence emerged. There is no suggestion of ulterior motive or bad faith. Indeed Binnie J went out of his way to acquit the authorities of

[143] Ibid at [535]–[541].
[144] Ibid at [542]–[547].
[145] Binnie Report at [566]–[569].
[146] Ibid at [571].
[147] Binnie Report at [64].
[148] Ibid at [573]–[579].
[149] Ibid at [65].
[150] Ibid at [597]–[603].
[151] Ibid at [67] and [580].

anything wilful, deliberate or intentional.[152] In my view he applied the wrong test to the conduct in question.

(c) Approach taken to connection between misconduct and imprisonment

210. I previously concluded that for conduct to be relevant for present purposes, there had to be a plausible connection, however indirect and remote, between the conduct, on the one hand, and the existence or duration of the imprisonment, on the other.

211. This requirement is not alluded to by Binnie J. His approach is illustrated in his discussion of official conduct after conviction and sentence. It is difficult to see how the Joint Report of the Police and Police Complaints Authority (1997),[153] the defamation action taken by Det Sgt Weir and Det Sgt Anderson,[154] or the victory party with its uncalled for sign[155] could have had any bearing upon the imposition or continuation of David's imprisonment. Yet these are cited under the heading "the adversarial attitude of the Police" in that portion of the report dealing with serious wrongdoing by authorities. In my view that was an error of principle.

212. Binnie J also criticised the destruction of evidence, citing Police authority to burn down the house at 65 Every Street within three weeks of the murders[156] and destruction of forensic material in 1996 before expiry of the time limit for seeking leave to appeal to the Privy Council.[157] Such matters could be indirectly connected with the existence or continuation of imprisonment only if certain assumptions are made – that the items destroyed contained evidence that would have been helpful to David Bain, that this would have been discovered in time to be of use to him and, in relation to the destruction of forensic material in 1996, that discovery of the evidence would have brought forward the hearing of the successful appeal to the Privy Council. None of these matters are addressed in the Report.

213. It follows that in my view Binnie J applied the wrong tests when seeking to bring the Bain case within the particular authority misconduct illustration provided to him by the Minister.

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[152] Ibid at [57], [58], [69] and [634].
[153] Ibid at [612 – 616].
[154] Ibid at [617 – 622].
[155] Ibid at [626].
[156] Binnie Report at [63].
[157] Ibid at [68].

Overriding discretion to go outside the examples given

214. There remains the overriding discretion of Cabinet to consider factors relevant to extraordinary circumstances, whether or not within the specific examples provided by the Minister. The question is whether the misconduct finding made by Binnie J might be justified under that broader heading.

215. I previously suggested that if the extraordinary circumstance relied upon by the Referee were authority misconduct, a Referee would be slow to justify it on any basis other than the wording of the Minister's specific example. That was based on:

(a) The relatively narrow objectives of the ex gratia compensation scheme discussed earlier;

(b) The Minister's stated expectation that cases outside the three examples provided would be "rare"; and

(c) The fact that there would have been little point in having the Minister spell out the nature of the authority misconduct thought to qualify unless those requirements were adopted in all but the most exceptional of cases.

216. I also thought that if a Referee did decide that this was one of those "rare" cases justifying a departure from the example provided by the Minister, one might expect that the Referee would expressly state the reasons for the departure.

217. In the present case Binnie J did not purport to rely upon any overriding discretion to depart from the wording of the example provided by the Minister. He went to considerable lengths to analyse what he understood the Minister's specific description of authority misconduct to require[158] before going on to apply those requirements to the facts.

218. There is no suggestion at any point that this was one of those rare cases which might qualify for exercise of the extraordinary circumstances discretion outside the examples given.

Conclusions regarding Justice Binnie's approach to authority conduct

219. I regret that I differ from Binnie J over the principles to be applied when deciding whether there has been serious misconduct by authorities. He paid no regard to the need for an official admission or judicial finding of serious misconduct; was prepared to treat conduct as "serious misconduct" even where it was neither

[158] Ibid at [480]– [492].

deliberate nor done in bad faith; and did not see the need for any plausible connection, however indirect and remote, between the misconduct and the existence or duration of the imprisonment.

220. It remains the case that Cabinet's discretion to make an ex gratia payment is ultimately open-ended. In that sense it may not seem to matter whether a Referee has gone beyond the precise wording of the extraordinary circumstances examples provided by Cabinet.

221. However in my view there are features of this case which made it important to stay within the wording of the authority misconduct illustration provided by the Minister. The underlying purpose of the ex gratia compensation discretion is to compensate the innocent, not to condemn official misconduct. To the extent that condemning official misconduct has been engrafted onto that process, it should be reserved for only those cases which are so egregious that they threaten the integrity of the judicial system. Inquiries into official misconduct that are not controlled by well-defined terms of reference and prescribed procedure can quickly spiral out of control. Without those safeguards they can also be unfair to the officials involved.

222. What is even more important is that in this case, Binnie J has gone on to make a well-publicised recommendation that compensation be paid. An essential plank of the recommendation was his conclusion that there was authority misconduct. To reach that conclusion he had to go outside the wording of the authority misconduct illustration provided.

223. Flexibility scarcely matters if a Referee is merely advancing factors thought to be relevant to the exercise of a discretion that is left entirely to Cabinet. In those circumstances Cabinet can pick and choose which factors it regards as relevant. But where, as here, the Referee has gone on to make a recommendation that compensation be paid, he has already purported to decide what is relevant and what is not. That makes it particularly unfortunate if he has gone beyond the authority misconduct illustration provided to him.

CHAPTER 7: PERSONAL CRITICISMS WITHOUT OPPORTUNITY FOR RESPONSE

Criticism of individuals by Justice Binnie

224. As a general principle people should not be publicly criticised in reports of this kind without the opportunity to defend themselves. Procedural fairness (traditionally referred to by lawyers as "natural justice") requires an adequate opportunity to respond. Where a Referee conducting an ex gratia compensation inquiry foresees personal criticism, the individual should be given notice of the allegation along with an opportunity to respond to it.

225. The opportunity to respond may be given in a personal interview or in the form of correspondence with the individual in the course of the inquiry. Alternatively a draft of the report may be provided to the individual with an invitation to comment before the report is finalised.

226. The Binnie Report criticises a number of individuals. They include:

(a) Detective Sergeant Weir, Detective Sergeant Kevin Anderson and Detective Senior Sergeant Doyle, all of whom were said to have made serious errors in the conduct of the inquiry.

(b) Three ESR scientists, Mr Peter Hentschel, Mr Kim Jones and Dr Sally Ann Harbison.

(c) Mr Maarten Kleintjes, computer expert.

(d) Sir John Jefferies and Judge NC Jaine, Police Complaints Authorities, who were said to have been parties to a Joint Report which was "essentially a Police advocacy document".[159]

227. Criticism of the Police has already been referred to in the discussion of serious misconduct of authorities above. The reference to the Police Complaints Authorities is self-explanatory. More detail is warranted in relation to the three ESR scientists and Mr Kleintjes.

228. Mr Hentschel gave expert evidence for the prosecution regarding luminol footprints and fingerprints on the rifle. Binnie J described Mr Hentschel's first trial evidence regarding sock size and foot length as "curious testimony";[160] described

[159] Binnie Report at [614].
[160] Ibid at [236].

his sock theory as "dubious";[161] accused him of attempting to "back away" during the 2009 trial from his 1995 description of the footprints, describing his explanation for the change as "rather imprecise and unsatisfactory";[162] said that his reference to "years of experience" was "...a general, all-purpose statement experts often resort to when caught without data"[163] and described his experiments in relation to socks in the following terms:[164]

> What Mr Hentschel seemed to be saying is that because he *believes* David Bain to be guilty and David Bain's foot is larger than 280mm it must therefore follow that the 280 mm prints *must* have been no more than partial prints despite his consistent testimony for 15 years that they were complete prints. (His emphasis)

229. Mr Jones gave expert evidence regarding fingerprints on the rifle. Binnie J referred to difficulties the prosecution must have had in presenting his evidence as credible having regard to his explanation to the jury about luminescence, conflicts with other Crown experts, and evidence regarding the chemical enhancement of one of the finger prints.[165]

230. The third ESR scientist criticised was the one responsible for the provision of a contaminated DNA sample to the defence expert, Dr Arie Guersen. Binnie J describes this as "serious misconduct".[166] It is referred to in the Executive Summary of his Report as evidence of serious misconduct which would warrant the grant of an *ex gratia* payment.[167] Although Dr Harbison is not specifically named, it is obvious from the earlier discussion in the Report that she was the ESR scientist in question.[168]

231. Mr Kleintjes gave evidence of a range of possible turn-on times for the computer. Being unable to be more precise, Mr Kleintjes split the difference between the earliest and latest times of his range. Binnie J's view was that "at this point … Mr Kleintjes disappoints", adding that "'[s]plitting the difference' may be acceptable for lawyers haggling over settlement of a personal injury claim, but such an approach ought not to be dressed up as 'median logic'".[169]

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[161] Ibid at [236].
[162] Ibid at [238].
[163] Ibid at [256].
[164] Ibid at [240].
[165] Ibid at [293].
[166] Ibid at [580].
[167] Ibid at [67].
[168] See Binnie Report at [296] and [299]–[300].
[169] Binnie Report at [334].

Was adequate opportunity provided for response?

232. Much of the compensation inquiry was concerned with the steps taken by the Police and their alleged shortcomings. Binnie J appears to have put the major allegations to Det Insp (formerly Det Sgt) Doyle and Det Sgt Weir during his interview with them. Adequacy of the opportunity provided for a response is ultimately a matter of degree. Adequate opportunity may well have been provided in their case.

233. There was no interview with Det Sgt Anderson, the three ESR scientists or Mr Kleintjes but many of the criticisms which Binnie J now makes were put to them as witnesses in the course of the trial. The criticisms were based upon Binnie J's review of the written record, including transcripts of the evidence they gave in Court. In that sense, it might be said that they had an earlier opportunity to answer the criticisms.

234. However, it is important to note the different context in which the criticisms were addressed.[170] In a criminal trial, competing expert opinions and adequacy of scientific methodology are assessed solely for the purpose of addressing the accused's guilt or innocence as part of the adversarial process. The conduct of experts giving evidence is relevant only to the extent that it may impact on someone else's guilt or innocence.

235. In the present inquiry, misconduct of authorities was a primary issue for its own sake. Any adverse comment about officers and state-appointed experts made in this context is a core finding of which there will be a permanent record.

236. Even if the entire Report were not made public, the key findings almost certainly would be. There is potential for damage to the professional reputation of those who are criticised. Natural justice requires that the person criticised be afforded an opportunity to comment over and above that offered at any antecedent criminal trial.

237. The two Police Complaints Authorities did not give evidence. They were not involved in any interview with, and presumably had no correspondence with, Binnie J.

238. Binnie J specifically asked the parties' representatives whether they suggested interviews with any other persons. No other names were suggested. However the

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[170] *Quantum Laboratory Ltd v Dunedin District Court* [2008] 2 NZLR 541 includes a discussion of the principles of natural justice as they relate to adverse comments made about non-parties in an adversarial process, compared to those which are at stake in an investigatory or inquiry process.

Bain team was quite properly there to protect the interests of David Bain and Crown Law Office to protect the interests of the state. Inquiries directed to the parties was no substitute for personal approaches to the individuals concerned.

Amenability to judicial review

239. Failure to afford a right of hearing to those whose reputations would be damaged by adverse comment can in some circumstances provide grounds for judicial review.

240. Because judicial review remedies are discretionary their grant can be difficult to predict with certainty. The Courts have traditionally been reluctant to review the exercise of the Crown's prerogative, particularly if the decisions in question involve matters of policy, but this does not mean that such powers are immune from review.[171] The scope of judicial review has widened significantly over the last thirty years. Any exercise of power which is of a public nature or has public consequences is potentially amenable to review, irrespective of the source of that power.[172] That is particularly so where the grounds for review involve a breach of natural justice, or where the reputation of a party may be seriously damaged, and there is no other avenue by which the criticised person may seek redress.

241. Reputation is an interest which the Court will strive to protect through the use of judicial review.[173] The fact that findings in a report may be mere expressions of opinion, and not determinative of any rights, does not preclude judicial review,[174] particularly if the report involves matters of major public importance.[175] As inquiries into alleged wrongdoing generally excite public and media attention, the process calls for carefully prepared and applied rules of law which are, among other things, designed to protect the rights and interests of those involved.[176] One of the factors weighing in favour of judicial intervention is the claim of serious damage to

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[171] *Akatere v Attorney General* [2006] 3 NZLR 705 (HC) at [24]. This case concerned a judicial review of the decision to make an *ex-gratia* payment under the Cabinet Guidelines on grounds of substantive fairness. Justice Keane found it unnecessary to decide the point, although he did indicate that if he had to he would probably decide that Cabinet's decisions were not susceptible to review (at [38]).

[172] *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11–12; Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2007) at 838; see also *Wilson v White* [2005] 1 NZLR 189 in which the Court of Appeal said that judicial review extends to all actions by public or private sector bodies that have public consequences and involve public law principles.

[173] *Peters v Davison* [1999] 2 NZLR 164 (CA) (Commission of Inquiry Report held to be reviewable).

[174] Ibid at 185–186.

[175] Ibid at 182, lines 1–5.

[176] Ibid at 182, lines 18–25.

reputation coupled with the absence of any of the usual remedies for such damage by way of appeal or defamation proceedings.[177]

242. Those criteria for intervention appear to be satisfied in the present case. The question of government compensation for David Bain is one of public importance. It is very much in the public arena. The Bain murders, along with Binnie J's appointment and recommendations, have already been the subject of much media scrutiny. There is no right of appeal or other obvious remedy.

Conclusions

243. The Courts will not interfere over trifles. Consequently in assessing the likelihood of judicial intervention a realistic view must be taken as to the harm which the Binnie Report would cause to reputation.

244. The Report's criticism of the Police Complaints Authorities appears to be in the less serious category. It seems unlikely that a remedy would be granted in their case even in the unlikely event that the individuals concerned were interested in litigation of that kind. The same appears to be true of Mr Kleintjes and Mr Jones. It could not be said that the criticisms were particularly serious.

245. The criticism of the other two ESR scientists seems more significant. Public release of the Binnie Report could well damage their reputations, even if to only a moderate level.

246. Damage to the reputation of the Police officers could be substantial. Two of the three have already been provided with some opportunity for response by way of interview. But that invitation was not extended to Det Sgt Anderson. The two officers who were interviewed may well have an argument that the opportunity provided to them was inadequate. The apparent purpose of the interviews may well have been to investigate innocence and deficiencies at a systemic level rather than to answer personal criticism.

247. Because judicial review remedies are discretionary, it is not possible to be definitive about the outcome if proceedings were issued in the present case. But it is sufficient to say that the possibility of successful proceedings by those criticised is a substantial risk.

248. In the end the relevant object for the Government is not to avoid a loss in court but to protect the reputation of individuals. The reputation of individuals has not been adequately protected in this case. It might well be thought that the proper

[177] *Peters v Davison* [1999] 2 NZLR 164 (CA) at 182.

course now is to take voluntary steps to remedy that situation rather than to react only if proceedings are issued and the courts so require it.

CHAPTER 8: FURTHER STEPS REQUIRED

249. In my opinion further steps are now required before Mr Bain's application can be resolved.

250. Some flexibility should be retained in order to deal with unforeseen developments. However the following is a provisional work programme which would take the matter through to completion:

(a) Read and analyse all documentary records in the case

(b) Prepare draft final report

(c) Send draft final report to those individuals who have been the subject of personal criticism and provide them with an opportunity for written response

(d) Revise the draft final report in the light of replies

(e) Send revised draft final report to David Bain and the Crown with opportunity for written responses (sequence to be Bain submissions, Crown submissions, Bain reply).

(f) Finalise report and send it to you as the Minister.

APPENDIX: LETTER OF INSTRUCTION AND ANNEXURES